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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 443

HUGHES TOOL COMPANY
and
RAYMOND M. HOLLIDAY,
Petitioners,

against

TRANS WORLD AIRLINES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

The "Questions Presented" and the "Statement" of the case set out in petitioners' brief are neither acceptable as accurate statements of the facts and issues involved in this controversy nor permissible as representations of the state of the record of this litigation to date.

Questions Presented

In defining the questions presented by this interlocutory appeal, it is important to bear in mind the limited scope of the present review. The limitations are the result of (a) the nature of the order appealed from, that is, an order directing the entry of a default judgment pursuant to Rules 37(b)(2)(iii) and 37(d) of the Federal Rules of Civil Procedure; (b) the opinion of the District

Court, which, in making the jurisdictionally necessary statement that the order involved a controlling question of law as to which there was a substantial ground for difference of opinion, identified that controlling question of law as the question raised below in light of *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963), (*"Panagra"*); and (c) the order of the Court of Appeals limiting its jurisdictionally necessary permission to appeal to "the issues of (1) Whether the U. S. District Court for the Southern District of New York had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the antitrust claim of [TWA]", and continuing with the words "in all other respects the application is denied".

The posture of the case following Judge Metzner's denial of petitioners' motion to dismiss the complaint was that the case was not to be disposed of on the pleadings and plaintiff was to have the right to inquire into the facts. No final determination in plaintiff's favor or against defendants on the issues had yet been made. A future motion for summary judgment as well as all the normal processes of trial were completely open to defendants. It was on the question whether plaintiff was to have the right to inquire that the defendants chose to draw the line of battle. The default order ensued.

There is therefore a serious question at the very outset whether petitioners are in a position to raise the primary jurisdiction and exemption issues which are urged to this Court. The default order is subject to attack only on jurisdictional grounds, and it is doubtful that questions of primary jurisdiction and antitrust exemption, raised by affirmative defense, are jurisdictional in this sense. Defendants had no right to appellate review of the denial of their motion to dismiss and, after the denial of that

motion, the District Court undoubtedly had the power to require discovery. It is settled that a court may issue a variety of orders and apply a variety of sanctions even before its jurisdiction to proceed or to grant particular relief is finally established, see, *e.g.*, *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947); and discovery is especially appropriate when it may facilitate the court's determination of a question as to its own jurisdiction. *Cf.*, *Collins* v. *New York Central System*, 327 F. 2d 880 (D.C. Cir. 1963). Questions of antitrust exemption and primary jurisdiction are of the very sort most likely to be illuminated by discovery since they are vitally affected by the evidence adduced in support of the antitrust claims asserted. Defendants were, of course, free to renew their motion at or prior to trial. It is submitted that, whether or not petitioners' primary jurisdiction or antitrust exemption contentions are meritorious, Judge Metzner had jurisdiction to enter the default order. *Cf.*, *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322 (1909).

There is a similar question with respect to the third issue presented by petitioners' brief, *i.e.*, the issue whether the complaint states a claim. As we have noted, the order of the District Court which was appealed from was a default order subject to attack only on jurisdictional grounds. It is submitted that the question whether the complaint states a cause of action does not present a jurisdictional question. *Bell* v. *Hood*, 327 U. S. 678, 682-83 (1946).

If, however, all of the issues which petitioners seek to raise are brought before this Court, respondent believes that petitioners' phrasing is impermissible under the pleadings and under the orders appealed from. These questions should be revised as follows:

1. Whether by reason of the Federal Aviation Act, the District Court was without the jurisdiction

necessary to enable it to enter an order, pursuant to Federal Rules of Civil Procedure 37(b)(2)(iii) and 37(d), directing the entry of a default judgment against defendants, with the amount of damages to be determined by a Special Master?

2. Whether, by reason of orders issued by the Civil Aeronautics Board, the conduct alleged in the complaint is exempt from the antitrust laws under Section 414 of the Federal Aviation Act, and the District Court was thus deprived of jurisdiction to enter its order under Rules 37(b)(2)(iii) and 37(d)?

3. Whether the complaint fails to state claims for relief sufficiently invoking the jurisdiction of the District Court and, as a result, the District Court was without jurisdiction sufficient to support its order under Rules 37(b)(2)(iii) and 37(d)?

Counter-Statement of the Case

This litigation began on June 30, 1961, when Trans World Airlines, Inc. ("TWA"), an air carrier with over 13,000 public stockholders, brought this action against the persons who had controlled and manipulated TWA and all of its affairs from 1940 or before until 1960, for their own benefit. TWA was enabled to take this action because, as a result of unusual circumstances, a new Board of Directors and management, composed of able and disinterested businessmen, independent of Hughes Tool Company ("Toolco") and Howard Hughes, had assumed control of TWA early in 1961.* The new Board of Directors

* Petitioners' constant reference to TWA's management as the "lender-management" is part of petitioners' deliberate effort to mislead this Court as to facts which this Court has no way of knowing, because they have never been put in the record. The implication is that TWA is presently managed by financial institutions. Not only is it improper on the state of the pleadings for Toolco so to imply, but the implication is provably false. When the financial institutions acquired the power to designate voting trustees who would in turn designate directors to replace Toolco's nominees, they turned to men of complete independence, of nationally established stature and with-

retained special counsel, also completely independent of both TWA and Toolco, to determine whether TWA had a cause of action to recover damages from anyone in connection with the procurement and financing of aircraft, ground equipment and training aids or otherwise (fol. 20197). On advice of special counsel this action was brought. By it, TWA seeks redress under the antitrust laws and under the common law for both past and continuing injuries inflicted on it by its former masters.

Both the Court of Appeals and the District Court would have much difficulty recognizing the case which petitioners have described to this Court as the case with which they dealt below. In their two closely interwoven briefs (in this and the companion No. 501),* the petitioners have artfully described the history and the existing status of this vigorously litigated controversy not as it is, nor as the record shows it, but as petitioners would like it to be in order to induce a decision in their favor from this Court. It is a tactic which petitioners have sought to use in the past. The District Court, however, in which the proceedings culminating in petitioners' default were conducted for over a year and a half, and the Court of Appeals, which, in addition to rendering the order appealed from, was required to examine into the pre-trial proceedings on an earlier application by these petitioners for review on an extraordinary writ, have consistently rejected petitioners' attempts to disguise their contentions as facts, their legal interpretations as deci-

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out any personal stake in the controversy. Such men were persuaded to accept this great responsibility (the personal seriousness of which is only in part indicated by the all-out attack which has been made on their reputations and their fortunes in Toolco's counterclaims and elsewhere) because they felt that the continued survival of TWA was a matter of national importance.

* Rather than similarly divide TWA's presentation between two briefs, we have thought it more convenient for the Court to consolidate in this brief a full statement of the facts and legal principles which we consider controlling in both cases as they affect TWA.

sions by the Board, and their frustration of plaintiff's effort to compile proof in the normal manner provided for by the Federal Rules of Civil Procedure as a failure of proof by the plaintiff.

The crucial fact is that this case has come before this Court at the pleading stage. Not only has there been no trial in which the plaintiff was able to put in its available evidence, but, when it became apparent that even a motion for summary judgment ran the risk of allowing the plaintiff to present evidence which would make defendants' contentions untenable, the defendants promptly withdrew that motion (A-121, fol. 2711).* The decision below, at its broadest, was on a motion for judgment on the pleadings incorporating a motion to dismiss for failure to state a claim and a motion to dismiss for lack of jurisdiction over the subject matter. Judge Metzner's determination in plaintiff's favor on this motion established that plaintiff had the normal right to proceed with pre-trial discovery of the kind which defendants had already conducted *in extenso*. Since discovery was what defendants were determined to prevent at all costs, they thereupon defaulted.

Petitioners' statement fails to give anything like a true picture of the essential basis of TWA's claims or the

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* Record references in this brief are designated as follows: those prefixed "A" refer to vols. I and II in No. 443; those prefixed "AA" refer to vol. I in No. 501; those prefixed "T" refer to vol. II in No. 501; those prefixed "B" refer to vol. III in No. 501; those prefixed "R" refer to vols. IV, V and VI in No. 443 and No. 501 which have been specially printed for the use of this Court; references to "fol." are to unprinted portions of the original record. This case, No. 443, and the companion case, No. 501, arise out of a single civil action and are before this Court on a single original record, certified as such by the United States Court of Appeals for the Second Circuit. Both cases were heard below on that single record in the Court of Appeals. All appendices printed for the use of the court below, in both cases, have been designated to be printed for the use of this Court in both No. 443 and in No. 501. While the cover pages of vols. I and II in No. 443 and of vols. I, II and III in No. 501 do not so indicate, each such volume is part of the printed record in *both* cases.

course of the proceedings to date. If this case is viewed against an accurate statement of TWA's claims and a fair estimate of the evidence which the proceedings to date suggest would have been developed in support of them if discovery had continued, and if it is considered in the context of the delaying and obfuscatory tactics employed by petitioners since this litigation began, it becomes apparent that the positions taken by petitioners are without merit and are, indeed, merely tools in a continued effort to disrupt and frustrate any orderly consideration of TWA's claims, an effort destructive of the integrity of judicial proceedings in the federal courts.*

The Trade and Commerce Involved

Contrary to the suggestion of petitioners' brief that the trade and commerce involved in this case concern only "the acquisition or financing of aircraft for TWA" and that the markets involved are defined in the complaint solely "in terms of TWA's requirements for aircraft" (Petitioners' Brief, p. 4), the trade and commerce involved are described in considerable detail in the complaint and consist of the furnishing of aircraft to TWA "and other air carriers" for use in air transportation in interstate and foreign commerce (Complaint, paragraph 7(a), A-3), the furnishing of jet-powered aircraft to TWA "and other air carriers" (Complaint, paragraph 7(b), *ibid.*), the furnishing of aircraft to TWA (Complaint, paragraph 7(c), *ibid.*), the furnishing of aircraft used by scheduled United States flag air carriers between certain pairs of cities in the United States between which TWA provides more than 60% of the scheduled air transporta-

* The basic facts which will be set out hereafter are derived from matters of public record, from the allegations of the complaint which, in the present posture of the case, must be accepted as true, and from evidence unearthed by TWA in the limited documentary discovery permitted to it prior to defendants' default and refusal to comply with orders of the District Court directing further discovery.

tion provided by all United States flag air carriers (Complaint, paragraph 7(d), *ibid.*), the furnishing of aircraft used by scheduled United States flag carriers between certain pairs of cities between which TWA provides the only scheduled air transportation provided by United States flag air carriers (Complaint, paragraph 7(e), A-3-4), and the financing of the acquisition of aircraft for use by TWA in air transportation in interstate and foreign commerce (Complaint, paragraph 7(f), A-4).

Thus, the actions of defendants which are the subject of this litigation were in the area of the development and supply of commercial aircraft for air carriers generally, and also involved the financing of such aircraft for use by TWA; a dominant position in this broad field of trade and commerce was the objective at which the conspirators aimed. In doing so, of course, they began by establishing control over TWA's segment of that market, and it is their dominance and manipulation of the TWA market for their larger private purposes which has so gravely injured TWA.

Toolco's Acquisition of Control of TWA

The conspiracy described in the complaint began 5 years after TWA's organization in 1934,* when defendant Toolco began to buy up the common stock of TWA pursuant to an understanding with Howard R. Hughes (the principal—and indeed dominant—conspirator and a named defendant herein, who, however, was never found for service in this action). Although the Civil Aeronautics Board (the "Board") later noted that "for all practical purposes" Toolco had achieved control of TWA for Hughes by the end of 1940 (6 C.A.B. at 154), an application requesting approval of this acquisition of control was not submitted to the Board until November 19, 1943

* TWA was incorporated as Transcontinental & Western Air, Inc.; its name was changed to Trans World Airlines, Inc. in 1950.

(R. 183), and the Board did not enter its order approving the acquisition until October 17, 1944. *Transcontinental & Western Air, Inc., Control by Hughes Tool Company,* 6 C.A.B. 153, 154. Toolco then held approximately 45% of the TWA common stock and Jack Frye, president of TWA, was employed in an "advisory capacity" by Toolco (6 C.A.B. at 155).* As will be seen, it was not until after 1960 that TWA was able to speak with its own voice to the Board, or to any other tribunal.

The question principally considered by the Board in ruling on TWA-Toolco's application for approval of this acquisition of control was whether Toolco was, in fact, a person engaged in a phase of aeronautics within the meaning of Section 408(a)(5) of the Civil Aeronautics Act, subsequently the Federal Aviation Act (the "Act"). The Board noted that among the requisites for its exercise of any jurisdiction in the matter was a finding that there was "an acquisition of control" and that the acquiring person was "engaged in a phase of aeronautics" (6 C.A.B. at 155-156). The Board concluded that Toolco might, under existing contracts, become a dealer in aircraft, if it had not become one already.** Since it was conceded that there had been an acquisition of control, the Board found its jurisdiction to have been established (6 C.A.B. at 156).

Finding that the likelihood of TWA's being forced, through the control exercised by Toolco, to purchase more aircraft than its economic operations required was remote in view of the "paternalistic attitude" which Toolco had

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* This is an early example of what proved to be a fairly usual practice for Toolco of employing TWA employees or executives in an "advisory" capacity to Toolco or of using Toolco employees as essentially full-time TWA executives. See, *e.g.*, the testimony on deposition of Rummel (fol. 12724 *et seq.*) and Leslie (fol. 12322) and the affidavit of Bew (T-104).

** Obviously, Toolco was already a dealer in aircraft, and it has never ceased to be such, as other carriers besides TWA have good reason to know. (See pp. 23 *et seq.*, *infra.*)

"exhibited up to that time," the Board concluded that the continuation of the relationship between Toolco and TWA "would not be inconsistent with the public interest" (6 C.A.B. at 156).

Public counsel urged that restrictive conditions be imposed on the Board's approval of the acquisition of control, and Toolco suggested that the order provide that if Toolco should commence manufacturing aircraft or aircraft parts, and if TWA should desire to acquire such aircraft or aircraft parts, then TWA and Toolco should be required to "return to the Board for further hearing *upon continuation of the relations between TWA and Hughes Tool*" (6 C.A.B. at 157) (emphasis added).*

The Board instead imposed a condition providing that its approval would "be effective" so long as commercial transactions between TWA and Toolco were limited to transactions involving complete items of property, the price of which did not exceed $200 each, with a further limitation that the total annual expenditure involved in any such transactions should not exceed $10,000 (6 C.A.B. at 158). In point of fact, the *average* annual expenditure by TWA for aircraft, equipment and supplies bought from or through Toolco during the next sixteen years exceeded $17,000,000.

At the beginning of 1947, TWA and Toolco entered into a Letter Agreement (dated January 8) which had the effect of increasing the extent of Toolco's control over TWA and which resulted in an order of the Board insti-

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* It is obvious that neither the Board nor its staff had the slightest thought that the order issued in this proceeding might possibly extend to activities by Toolco in its capacity as a general dealer in aircraft seeking to obtain a dominant competitive position in that field. Toolco's counsel in that proceeding, in a letter written to the Hearing Examiner at the time, specifically stated:

> "* * * the approval sought by Hughes Tool Company in this case would not constitute a license to permit Hughes Tool Company or TWA to do whatever they desire in the future * * *." (R. 610)

tuting an investigation to determine whether that Letter Agreement constituted a further acquisition of control which would require a new approval order pursuant to Section 408. In an opinion reported as *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.*, 9 C.A.B. 381 (1948), the Board concluded that there had been an additional acquisition of control for which its approval under Section 408 would be required and that a hearing was necessary (9 C.A.B. at 391-92). The investigation preceding this order, and the discussion by the Board in its opinion, were concerned solely with whether an additional acquisition of control had taken place, and not with whether that acquisition of control was in the public interest.

The 1947 Toolco-TWA Letter Agreement provided, among other things, that Toolco would lend TWA $10,000,000 in return for 2¾% notes convertible by Toolco into TWA common stock, that TWA's Board of Directors would be reconstituted so that the majority would be nominees of Toolco, and that, pending completion of the transaction, no change would be made in TWA's by-laws without the written consent of Toolco (9 C.A.B. at 384). The reconstituting of the Board of Directors had already been accomplished (and the resignation of the previous president compelled) when the Board commenced its investigation.

The Board noted that this Letter Agreement had its genesis in disagreement between TWA's management and Toolco on financing the carrier's capital needs after the end of the war (9 C.A.B. at 383). The Board observed that there was nothing in the record to indicate that a successful flotation of equity securities could not have been accomplished during 1945 and 1946, as TWA's management desired (9 C.A.B. at 383-84). It pointed out, however, that the differences of opinion delayed action on any definite program and that, as a result, nothing was

done until an unfavorable turn in the securities market about September 1946 made any large-scale equity financing difficult. The Board also observed that by the end of 1946 TWA's financial condition had become critical and that in the closing months of that year the carrier was "facing bankruptcy." According to the Board, Toolco was willing to be of financial assistance but was unwilling to furnish additional money without having further control over its spending. The Letter Agreement of 1947 was presented as a solution to this problem (9 C.A.B. at 384).

Referring to its 1944 order, the Board noted that it had been "clearly couched in terms of factors then present" and related solely to the degree of control existing at that time (9 C.A.B. at 388). The Board thought it clear that "we did not intend to, and did not, grant a blanket, unlimited *in futuro* approval of the relationship between Toolco and TWA", and that an approval of anything other than the acquisition of the degree of control submitted in the first control proceeding "would have been made in clear, unmistakable language" (9 C.A.B. at 389). It would be unreasonable to assume that the approval granted in 1944 would "forever constitute an unlimited ratification of any and all future acquisitions of ownership interest in the carrier" (*ibid.*). The Board specifically rejected the argument that its approval of "the acquisition of control, by the purchase of common stock" could be held to be "words of art, importing a blanket, technical meaning and covering in umbrella-like fashion all subsequent transactions under which the acquirer may have obtained an additional substantive interest in the carrier" (9 C.A.B. at 389-90). The Board went on to say:

> "It bears repeating that there is no support in either the record or the opinion for the contention that the words in question were intended as an

> expression of blanket approval of the relationship under consideration." (9 C.A.B. at 390) (Footnote omitted.)

Finding that the Letter Agreement amounted to a further acquisition of control, the Board ordered that an investigation be conducted to determine whether Toolco's acquisition of control was consistent with the public interest and met the conditions of Section 408.

That further investigation culminated in an order of the Board issued on October 6, 1950, reported as *Trans World Airlines, Inc., Further Control by Hughes Tool Company,* 12 C.A.B. 192. The Board's opinion and order, only two pages long, did not discuss in detail the reasons for its approval. The Board did note the position taken by public counsel that the control of TWA theretofore exercised by Toolco had been "detrimental to the interest of the carrier and the public interest", but that disapproval of the additional stock acquisition would not adequately "remedy or mitigate the existing situation", and that since the Board did not have adequate power to deal with the situation, it was left with "no alternative than to approve such additional stock acquisition" (12 C.A.B. at 192, 193). After setting out the position of public counsel, the Board concluded merely that:

> "The record in this proceeding does not permit us to reach any other conclusion than that reached by the examiner, viz., that the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act." (12 C.A.B. at 193)

The Board accordingly agreed with and adopted the findings, conclusions, and recommended decision of the Examiner.

In his 31-page report, the Examiner considered not at all any effect the acquisition of control might have on

competition either in the aircraft industry or in air transportation. He directed himself almost exclusively to TWA's financial history. In recounting this history, the Examiner noted that from February 1944 until the close of 1946 the management of TWA had made repeated requests of Toolco for approval of plans to finance the carrier's expansion (12 C.A.B. at 201), that the principal officers of the carrier were convinced that the sale of equity securities was preferable to large borrowings (*ibid.*), that neither Hughes nor the other Toolco representative involved disagreed with the position that additional financing would be necessary (12 C.A.B. at 202), that Toolco and Hughes repeatedly refused to agree to equity financing (12 C.A.B. at 202-04), that TWA's financial condition deteriorated rapidly during 1946 (12 C.A.B. at 205), and that in the closing months of 1946 TWA could not attract any capital and was facing bankruptcy (12 C.A.B. at 206). Summing up, the Examiner said:

> "• • • whatever were TWA's problems in promoting equity financing to meet its postwar capital needs, the insistence of Mr. Hughes and Mr. Dietrich [then Toolco's chief financial officer and Hughes' principal lieutenant] on debt as a matter of deliberate policy to meet TWA's capital requirements right after the war ended must be condemned." (12 C.A.B. at 222)

The Examiner concluded, however, that the additional acquisition of control should nevertheless be approved, citing principally "the manner in which Mr. Hughes and his company rallied to the support of the carrier during the financial crisis of late 1946 and early 1947" (12 C.A.B. at 223)—the same crisis which had been created by Hughes' refusal to agree to equity financing in the first place.*

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* The Examiner noted that public counsel had posed three alternatives as possible answers to the question posed in the proceeding (12 C.A.B. at 215-16). The first alternative was that a limitation be

The order issued by the Board in 1950 provided only that

> "• • • the additional acquisition of control of Trans World Airlines, Inc. (TWA) by the Hughes Tool Company (Toolco), found to exist by the Board's opinion and order of June 30, 1948 (9 C.A.B. 381) be and it hereby is approved as consistent with the public interest and the requirements of the Act; *provided*, that such additional control shall be exercised in accordance with the terms and conditions of the Board's opinion and order, 6 C.A.B. 153, as amended, approving the original acquisition of control of TWA by Toolco." (12 C.A.B. at 193)

The reference back to the earlier order and the similarity in language indicate that this order, like the 1944 order, did not grant a "blanket, *in futuro* approval of the relationship between Toolco and TWA" and was not intended "as an expression of blanket approval of the relationship under consideration."

Defendants' Unlawful Conspiracy—

The Beginning to December 1960

The complaint alleges that since approximately 1939 the defendants Toolco, Howard Hughes and Raymond M. Holliday, the co-conspirator Atlas Corporation ("Atlas")*

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imposed on the exercise by Toolco of the rights flowing from its additional stock acquisition, presumably by establishing a voting trust for the stock. Public counsel, however, had dismissed this alternative as impracticable. The second alternative was to reject approval of the additional acquisition and reopen the question whether all control of TWA by Toolco should be terminated, but public counsel apparently entertained serious doubt as to the Board's power to terminate a control the acquisition of which had been previously approved. The third alternative suggested by public counsel was that the history of Toolco's relationship with TWA be used as a case history for demonstrating to Congress the need for public control of security issues by air carriers.

* Hughes had for some time held the beneficial ownership of voting trust certificates with respect to 11% of the common stock of Atlas.

and other persons acting for each of them (Complaint, paragraph 9, A-8) have engaged in a course of conduct which had as its intent and purpose that Toolco would become a dominant source of supply of aircraft to air carriers, that defendants would seize control over TWA and its business to use for their own purposes in advancing this objective, that Toolco would become the sole supplier of aircraft to TWA, that TWA would thereafter be used as a captive market for aircraft to be supplied by Toolco, that the requirements of TWA for aircraft, including jet-powered aircraft, would be enlarged for the benefit of defendants and Atlas by various means, that suppliers of aircraft other than the defendants would be boycotted and foreclosed from furnishing aircraft to TWA and other air carriers, that defendants would supply TWA with aircraft only on the condition that TWA accept such financing arrangements as defendants dictated, that defendants would allow TWA to procure financing essential for the acquisition of aircraft only on condition that it also accept such aircraft as the defendants dictated, and that as a result defendants and Atlas would obtain substantial profits for themselves at the expense of TWA and other air carriers and as a result of the restrictions upon competition heretofore described (Complaint, paragraph 10, A-9-10).

Among the acts alleged to have been committed by the defendants prior to December 1960 pursuant to this conspiracy were

—an arrangement to develop with the Convair Division of General Dynamics Corporation ("Convair") a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers, including TWA, with the intention that TWA would be a captive market for such aircraft (which development program was subsequently abandoned as not in the self-interests

of the defendants and Convair) (Complaint, paragraph 14, A-11);

—the development of a plan, also later abandoned after being actively pursued by defendants, under which Toolco would itself commence the manufacture of jet-powered aircraft to be furnished to TWA and other carriers (Complaint, paragraph 15, A-12);

—the taking of action to prevent TWA from making any arrangements for the acquisition of jet-powered aircraft from Boeing Company ("Boeing") and Douglas Aircraft Company, Inc. ("Douglas") at a time when other competing carriers were placing orders for such aircraft (Complaint, paragraphs 15, 16, 17, A-12);

—the placing of orders by Toolco for its purchase of 33 Boeing jet-powered aircraft and 30 Convair jet-powered aircraft and the refusal of defendants to assign the rights to acquire any of such aircraft to TWA (Complaint, paragraphs 17, 18, A-12-13);

—the continued frustration of all efforts of TWA to acquire jet aircraft itself until the period 1959 to 1960 when defendants arranged for Toolco to lease certain jet-powered aircraft to TWA on a day-to-day basis, but subject to the condition and understanding that TWA would not purchase or lease aircraft from any other potential supplier (Complaint, paragraph 20, A-13);

—the diversion to TWA's principal transatlantic competitor of six Boeing jet-powered aircraft on order by Toolco (Complaint, paragraph 18, A-12-13);

—and the foreclosure by these means of all other potential suppliers of jet-powered aircraft from the TWA market (Complaint, paragraph 49, A-22).

It is further alleged that the defendants, together with Atlas, which owned 56% of the stock of Northeast Airlines, Inc. ("Northeast"), sought to compel TWA to enter into a disadvantageous merger with Northeast for the purpose of enlarging TWA's requirements for new aircraft

and thereby enlarging the market from which suppliers other than the defendants would be foreclosed, and for the additional purpose of enabling Atlas and its stockholders, including Hughes, to obtain stock of TWA on advantageous terms (Complaint, paragraph 21, A-13-14). Moreover, in November 1960, while this proposal for merger was pending, defendants arranged for the lease by Convair to Northeast of six aircraft ordered by Toolco from Convair, including three aircraft which had previously been assigned to TWA (Complaint, paragraph 22, A-14).

It is further alleged that, once having acquired control of TWA, Toolco and the other defendants continuously refused to allow equity financing by TWA except on terms which would increase Toolco's equity position in TWA and instead caused TWA to obtain funds chiefly by means of debt financing (Complaint, paragraph 23, A-14), that the purpose and effect of this policy were to maintain control by the defendants of the financing of the purchase of aircraft by TWA and to strengthen defendants' control over the acquisition of aircraft by TWA (Complaint, paragraphs 23, 24, A-14-15), and that by reason of this policy TWA was prevented from obtaining the financing necessary for its acquisition of jet-powered aircraft until December 1960 when the prevailing interest rate for debt financing was approximately 6-6½%, rather than the 4% to 4¾% interest rate secured by other air carriers in 1955 and 1956 (Complaint, paragraphs 26, 27, A-15).

The Evidentiary Record

Defendants' studied and continued resistance to discovery and their ultimate decision to default rather than permit discovery by plaintiff to proceed has succeeded in preventing TWA from obtaining significant documentary information. In addition, as a result of defendants' decision to terminate discovery proceedings, not a single word of testimony could be obtained from any of the defend-

ants, and particularly from Hughes, the principal architect of defendants' conduct and policies.*

It must be borne in mind, therefore, that the "record" of this proceeding has been contrived by petitioners, defendants below, so that it will seem as barren as possible of information in support of TWA's complaint. TWA was severely limited in introducing even the available documentary evidence into the record by the fact that it never itself had the opportunity to conduct deposition proceedings, during which, in the normal course, such evidence would have been identified and introduced as exhibits. The small fraction of the documents obtained by TWA which is in fact in the record at this time is the result of defendants' attempt, at one stage of the proceedings, to join its motion to dismiss with one for summary judgment. The ambiguity of defendants' position as to whether factual material *dehors* the pleadings would be relied on resulted in the submission of an affidavit by TWA's counsel, John F. Sonnett, annexing a small selection of the available material on which TWA would rely if a motion for summary judgment or some similar motion addressed to the merits was to be entertained (fol. 2929-33, T-1-112).** Defendants at that point hastily withdrew the summary judgment branch of their motion (A-121).

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* Defendants' activities in resisting discovery are described at pages 38-53, *infra*. It should be here noted that defendants' self-described "business decision" to default was attributed by them to their low estimate of recoverable damages (A-130). No suggestion was made that for any reason Hughes was unable to testify or that defendants were unable to produce the obviously important "attorney-client" documents and tax information in accordance with the District Court's orders.

** A series of documents which were annexed as Exhibit A to the Sonnett affidavit appear in the record at T-1 to T-84. They give a fascinating glimpse behind the scenes of a few transactions. Consisting as they do primarily of fragmentary verbatim transcripts of telephone conversations and informal personal memoranda, they make

Even the evidence in this severely limited record succeeds in documenting many of the allegations of TWA's complaint and in demonstrating the baselessness of petitioners' claim that TWA's complaint is not really an antitrust complaint but only one with "antitrust jargon".

For example, during Toolco's examination of TWA by R. W. Rummel, TWA's chief technical and aircraft procurement officer,* this revealing colloquy occurred:

> "Q. Were you ever told, was it ever suggested to you by anyone, that you should not approach anyone to explore the possibilities of their having a useful product?
>
> "A. Well, *Yes,* I have been • • •." (T-113) (Emphasis supplied.)

When Toolco's counsel conducting the proceedings made no attempt to determine who it was who had given these instructions (T-113-31), the Special Master specifically instructed Rummel to state who had given him such instructions and in what instances (T-131).

Thus, when Douglas Aircraft Company officials stated to Rummel that they would like to deal directly with TWA (T-136), Hughes personally instructed Rummel that

> "• • • Douglas would have to come to him before we did any more with them, and we did not work with Douglas" (T-137).

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an extensive use of first names, abbreviations and similar shorthand. While TWA has not had the opportunity to have them explained under oath, it is believed that, for the most part, the subject matter is sufficiently plain to establish from these documents alone that the charges which TWA has made in its complaint are based upon solid fact.

* In addition to being TWA's chief technical and aircraft procurement officer, Rummel was simultaneously employed by Toolco in a similar capacity and was closely associated with Hughes from the early 1950's until December 1960.

Rummel also testified about Hughes' personal order to him to have nothing to do with the Convair 990 aircraft:

> "The instructions were that I should not participate or allow the participation in either contract or specification development activities, that we should not inspect any 990 parts or components at the Convair facility, and that we should not discuss the 990 with Convair" (T-132).

These instructions were issued (and followed to the letter) with respect to aircraft ordered by Toolco but to be built to the specifications of American Airlines (T-66-70, T-111-12, T-132, T-159, T-163-77), and which Toolco was later to attempt to force upon TWA (Complaint, paragraphs 37-39, 45, A-18, A-20, T-58).

TWA's chief technical officer was similarly directed to have nothing to do with development of the Lockheed Electra (T-133, T-145-47), although Hughes and Toolco were engaged in serious, secret negotiations involving the acquisition of 40 such aircraft (A-852, fol. 13916-17, T-57, T-146-47), just as he had earlier been barred from certain Toolco negotiations with Lockheed about the Lockheed 1049 aircraft which Toolco subsequently acquired and sold to TWA (T-145-47, R. 1330). Indeed, Rummel was even ordered at times to cease all contact with the Boeing Company respecting the 707-131 and 707-331 jet-powered aircraft (T-134, T-147-56, T-161), and even though these directions placed the critically important Boeing program in jeopardy "we felt obliged to literally follow the instructions * * *" (T-150).

Another enlightening illustration of how TWA's aircraft were in fact chosen during the Hughes years can be seen in the procurement of the Lockheed 1449A. In December 1954, after TWA executives nominally responsible for aircraft procurement, including its then president, had concluded that TWA should purchase Douglas DC7C piston aircraft to meet its equipment needs until jet air-

craft became available (T-72-77, T-210-12), Toolco overruled this decision and directed instead that a contract be signed at once for the purchase of Lockheed 1449A aircraft (T-72-77, T-211-14). Specifications for these aircraft had not even been completed, but Hughes directed, despite TWA's efforts to dissuade him, that Toolco sign a purchase contract with Lockheed, with which Hughes had been in personal negotiations, before the end of the year and that TWA drop its negotiations with Douglas since it would in due course be required to purchase from Toolco the Lockheed 1449s. A contract was duly executed on December 23, 1954*, with Rummel participating as a technical consultant on TWA's special requirements. TWA *never* was permitted to buy Douglas aircraft.

Read as a whole, the Rummel testimony clearly indicates, in spite of Toolco's protestations otherwise, that in almost every instance where serious consideration was given to procurement of aircraft, Hughes and Toolco made the decisions and gave the orders so as to preempt for themselves the supply of aircraft to TWA, and that negotiation between TWA and other suppliers of aircraft was constantly thwarted. Indeed, in most instances TWA's management (except Rummel) was not informed about what was going on, and Rummel was ordered by Hughes to keep even them in ignorance (T-138-41, T-163, T-207).

With respect to financing it is noteworthy that, in spite of extensive examination of TWA's former chief financial officer, A. V. Leslie (also a long-time Toolco officer), defendants failed to inquire into the facts behind and the reasons for Leslie's handwritten commentary, "TWA,

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* The placing of that order in that manner appears to have been but another of defendants' maneuvers to strengthen Toolco's dominance in aircraft supply while simultaneously easing the ever present tax problems arising out of the accumulation of enormous surpluses in Toolco (T-71).

An Appreciation" (T-85-103). In that commentary, Leslie notes:

> "It was stated by *Hughes* at the time the orders were placed ([to] among others the writer) that TWA was not to concern itself with the financing of this equipment as he through Toolco, would find initially the required funds." (T-85) (Emphasis in original.)

After thus precluding TWA from arranging financing for itself, defendants' consistent approach was to refuse to consider any financing proposal except through Toolco, at whatever sacrifice to the interest of TWA. When finally, in desperation, TWA's directors attempted to conclude an arrangement which would meet TWA's needs and avoid bankruptcy, and which would have involved some loans from financial institutions directly to TWA, Hughes' attitude is revealed in the following verbatim transcript of a message from Hughes to Wm. A. Forrester, Jr., on October 28, 1960, a copy of which was fortunately preserved in Hughes' telephone rooms. Hughes said:

> "I have never liked this plan [the financing plan ultimately adopted by TWA when the voting trust came into being]: I have never been in favor of this plan: I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body . . . . I have fought it hammer and tong from the very first day that I ever heard of it." (T-82-83)

From time to time Toolco has sought to suggest that it is not in fact a supplier of aircraft. For example, in footnote 12 at page 13 of petitioners' brief the statement is made that:

> "It has never been suggested that Toolco was a general 'dealer' in aircraft suitable for airline requirements. The 'positions' taken by Toolco with

> respect to aircraft were solely with a view toward making the aircraft available to TWA—in other words, toward facilitating TWA's acquisitions of aircraft."

This position of Toolco's is conclusively refuted by the present record.

For instance, after defendants caused Toolco to purchase no less than 15 Boeing 707-131 jet aircraft, 18 Boeing 707-331 jet aircraft and 30 Convair 880 jet aircraft in its own name, they consistently refused to assign any of their planes to TWA. Late in 1957, in answer to a letter from TWA's then president, Toolco explained:

> "For various reasons Hughes Tool Company cannot yet commit itself to TWA with respect to these aircraft, either as to type or number; but, on a basis to be determined later, it is expected that some jet aircraft will be made available to TWA." (T-53)

About a year later Toolco representatives "pointed out that Hughes Tool has not yet agreed to furnish jet planes to TWA" (T-52) and that:

> "• • • Hughes Tool Co. had NO intention of selling or leasing their stuff (jet planes implied) to TWA • • •." (T-52) (Emphasis in original.)

Indeed, what defendants sought to do, as the list of transactions and contemplated transactions noted below clearly indicates, was to retain a "good trading position" for themselves as suppliers of aircraft (T-27) not only to TWA but to air carriers generally. Thus:

(1) Defendants supplied Northeast Airlines with 10 Vickers Viscount aircraft in 1958, long before Toolco had any financial interest in Northeast, but at a time when Hughes had an interest in Northeast's then parent, Atlas Corporation (T-1-6);

(2) Toolco attempted to sell certain of its Convair 880s to Capital Airlines (T-7);

(3) Toolco negotiated with Northeast Airlines beginning early in 1959 for the disposal of certain of its Convair 880s, and Northeast finally received six Toolco 880s (T-8-19, T-28), three of which had been previously assigned to TWA (T-110);

(4) Aside from the six diverted to Northeast, Toolco attempted to sell an additional 14 of its Convair 880s—seven to National Airlines and seven more to the United States Government (T-28-31);

(5) Toolco also attempted to sell certain of its Convair 880s to Northwest Airlines (T-27);

(6) Toolco diverted to Pan American six of the 18 Boeing 707-331 jet aircraft urgently needed by TWA (T-7, T-209);

(7) Hughes and Toolco planned to sell all 15 Boeing 707-131 jet aircraft to American Airlines (T-62-63);

(8) Toolco contracted for seven Convair 880M aircraft built to the specifications of Capital Airlines (T-21, T-27, T-81, T-112, T-169, T-172, T-174);

(9) Toolco contracted for 13 Convair 990 aircraft built to the specifications of American Airlines (T-58-70, T-111-12, T-164-76);

(10) Toolco and Hughes planned to build Caravelle jet aircraft in the United States for sale to TWA and other air carriers (T-139-40);

(11) Hughes and Toolco planned to build jet aircraft with AVRO of Canada for sale to TWA and other air carriers (T-35-36, T-137-38).

Indeed, if Toolco was not a supplier of aircraft to air carriers generally, it is hard to understand its purchase of

some 300 Pratt & Whitney jet engines at a time when engines were in short supply (T-37-49). By this purchase alone Toolco acquired rights to enough engines for original installation in 75 jet transports. The purchase, which was far beyond any conceivable need of TWA for spare engines (T-37), effectively gave Toolco a corner on the jet engine market (T-37-49), which Toolco later exploited in a sale of most of the engines to Boeing at a substantial profit (T-39-48).

Toolco's suggestion that the "positions" it took in aircraft were solely with a view "toward facilitating TWA's acquisition of aircraft" is conclusively answered by the shocking story of how the defendants delayed deliveries to TWA of urgently needed Convair 880 jet aircraft for more than a year, apparently to enable Toolco itself to obtain financing so that it could purchase such aircraft and then lease them to TWA. That account of what the defendants did is set out in an affidavit by J. William Bew, the principal liaison agent between Toolco and Convair in connection with the purchase, manufacture and delivery of Convair 880s, and the one man who was on the scene throughout the period in question (T-104-12). His recollections set forth in the affidavit are confirmed by the testimony of Rummel (T-145, T-157-62, T-179-80). As described by Bew and Rummel, Toolco's tactics included:

> —arranging for the bailment from Convair to Toolco of the first four aircraft scheduled to be delivered to TWA, removing these aircraft from the production line and placing them in an open field next to the Convair plant under armed guards hired by Toolco;
>
> —directing TWA personnel to refrain from discussing delivery terms with Convair;
>
> —demanding that Convair refrain from running various necessary tests on the aircraft being manufactured;

—ordering TWA not to fly acceptance flights or make final inspections on aircraft tendered for delivery by Convair;

—requiring TWA to refuse to accept aircraft tendered for delivery;

—prohibiting Convair from flying demonstration flights, even though such flights for other potential purchasers would have increased the likelihood of Convair's selling more 880 aircraft and, under the terms of Toolco's contract with Convair, would have led to a price reduction on the aircraft ordered by Toolco and ultimately purchased from it by TWA (T-106-08).

Delta Air Lines, which had been scheduled to receive Convair 880 aircraft on a schedule interspersing deliveries to it with those to TWA, in fact had received all ten of its aircraft before TWA had delivery of its second (T-104-12).

Thus, despite defendants' efforts to obscure their past misconduct by suggesting that no factual basis exists to support plaintiff's allegedly "technical" antitrust complaint, even the Toolco-made record proves otherwise. In addition to information such as is detailed above, had defendants not chosen to default, TWA would have had discovery from Hughes and Toolco with regard to defendants' actual intentions and entire course of conduct in the fields of aircraft development, acquisition and supply. Thus, the truth would have been disclosed about many activities adumbrated in the present record, a few examples of which are:

(a) Hughes' personal interest in the development and sale of the Boeing 307 Stratoliner in 1939 (fol. 13791, fol. 13795);

(b) Hughes' joint venture agreements with Lockheed in 1939 and 1940 which led to the development of the Excalibur A (Constellation) aircraft and why 40 such aircraft

were ordered for Hughes' personal account (fol. 13796, fol. 13803-04, fol. 13847);

(c) The numerous purchases and leases by TWA from Toolco of various Lockheed Constellation aircraft purchased by Toolco from Lockheed, Air France, Cal Eastern Aviation, Air Italia, Delta Air Lines, Resort Airlines and others and what happened to such aircraft not sold or leased by Toolco to TWA (R. 1330, fol. 14116, fol. 14123, fol. 14136, fol. 13802 *et seq.*, fol. 13847, A-183, A-800, A-839, A-847);

(d) Toolco's purchase of eight Lockheed 1049G aircraft in 1955 despite Hughes' demand that TWA not deal with Lockheed in regard to these planes and the subsequent purchase of these aircraft by TWA from Toolco (T-145-47, fol. 13985, R. 1330);

(e) Toolco's purchase of 58 CJ805 jet engines from General Electric (fol. 13567);

(f) Defendants' negotiations with Crown, a major stockholder of General Dynamics, in which Hughes was offering to purchase "all his future planes" from General Dynamics' Convair division in return for financial assistance from Crown (T-31-34, T-37);

(g) Toolco's various proposed financing plans during the jet period which would have set up a Toolco subsidiary to lease jet aircraft to TWA and others and the actual leasing arrangements which were made with TWA and eventually Northeast as well (T-85 *et seq.*, B-237 *et seq.*, A-199 *et seq.*, AA-246-47).

Answers to these questions and the numerous others of a similar nature, which are only partially disclosed by the present record, would fill out and complete the pattern of conspiratorial and unlawful conduct alleged in the complaint.

In point of fact, Howard Hughes is one of the wealthiest and most powerful men in the world. He has very

extensive influence in various industries, including great influence in numerous powerful financial institutions. The keystone of Hughes' interests is his 100% ownership of Toolco, one of the great industrial corporations in the United States, whose principal business (among many) is the manufacture of drilling bits for the oil industry. Since Toolco has no public security holders, however, little public information exists about its operations and influence and it has been able to preserve a most extraordinary secrecy about its activities.

As is indicated by some of the facts summarized above, one of Hughes' principal interests covering the period of the past thirty or more years has been aircraft development, production and distribution. While manufacture of commercial air transports under his exclusive control (though seriously contemplated on various occasions) has never ultimately eventuated, it is believed that a full investigation would reveal that specialized joint ventures with aircraft manufacturers on terms giving to Hughes or to Toolco a major interest in production and sales and substantial control over both design and deliveries were common during the twenty-odd years in which TWA was part of the Hughes empire.

Early in the maturation of Hughes' plan to acquire a dominant position in the field of aircraft development and sales to air carriers, he foresaw the great advantage which could be derived from establishing control over a major air carrier and using that control for his own benefit. This assured and completely manipulable market would make it possible for him to establish, as he did, himself and Toolco as a leading source of supply to other air carriers, and as both an important customer and a competitor of the leading manufacturers of aircraft and related equipment.

Civil Aeronautics Board Action 1944-1960

Throughout the period that began with the Board's approval of Toolco's acquisition of control of TWA in 1944 and ended with creation of the voting trust in December 1960—the period during which the events set out above took place—Toolco or TWA, dutifully responsive to Toolco's direction, filed a number of applications with the Board to request modification of the initial control order, which otherwise would have prohibited various transactions between Toolco and TWA. In each instance, the application described a discrete transaction involving either the sale or leasing of aircraft or equipment by Toolco to TWA or some financing arrangement with respect to TWA.

In only one of these instances does the record show any action by the Board with respect to the application other than the order granting it. That one exception relates to TWA's application on May 10, 1956 for a modification to permit TWA's purchase from Toolco of certain jet aircraft to be manufactured by Toolco. On June 8, 1956 the Board ordered an investigation to determine whether the entry of Toolco into the business of manufacturing jet aircraft would affect the control relationship so significantly as to require a new proceeding under Section 408 (Order E-10360, A-189). After the Board ordered this investigation, Toolco abandoned its proposed manufacturing project, and the investigation was ultimately terminated (Order E-12604, A-195).

In every other instance, as the tabular summary in Annex A shows, Toolco or TWA, acting under the control of Toolco, submitted its application, and the application was granted. The applications themselves were brief and provided only a superficial description of the contemplated transactions. For example, the application for a modification to permit TWA to lease one Boeing 707 from Toolco on a day-to-day basis and to acquire cer-

tain spare parts from Toolco, referred to at page 29 of petitioners' brief, was but two pages long, with two short exhibits attached: the Lease Agreement and a Letter Agreement with respect to the purchase of spare parts (R. 369-77). The application was filed January 30, 1959, and the Board's order granting it issued on February 26, 1959.

This application is typical of the submissions made to the Board which were the bases of the Board's successive orders modifying the original control order in the case of each of these separate transactions. Each of the orders was issued in a non-adversary administrative proceeding. Except for Order No. E-11432 (June 11, 1957) (A-192) (involving a purchase of substantial additional TWA stock) and Order No. E-13334 (December 30, 1958) (A-196) (involving guarantees of loans apparently considered to potentially increase the control of Toolco), none purported to *approve* anything.*

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* The language used by the Board in modifying or amending the original 1944 *Control Order* took different forms. In the earlier orders—No. 4437 (A-174), No. E-922 (A-175), No. E-2404 (A-177), No. E-4160 (A-179), No. E-5324 (A-180), No. E-8214 (A-183) and No. E-10300 (A-185)—the modification or amendment was achieved by ordering the addition to the 1944 *Control Order* of a paragraph reading substantially:

> "That the terms of this order shall not restrict or affect the right [of Toolco or TWA to carry out the transactions described in the motion requesting modification]."

In subsequent orders—No. E-10871 (A-190), No. E-11432 (A-192), No. E-13334 (A-196), No. E-13542 (A-199), No. E-13873 (A-201), No. E-14169 (A-204), No. E-14504 (A-207) and No. E-14877 (A-209)—the Board's language, with slight immaterial variation, was

> "That order 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit [the transactions between TWA and Toolco set forth in the motion for modification]."

In Orders No. E-15430 (A-211), No. E-15561 (A-215), and No. E-16195 (A-218), the modifying language read:

> "That the restrictions imposed on transactions between Toolco and TWA by order 3210, as modified, are further modified to permit TWA to consummate the transactions described * * *."

Except for Order No. E-922 (October 29, 1947) (A-175) which modified the 1944 control order in respect of TWA's purchase of certain Toolco-manufactured radar units at cost, each order involving any acquisition of aircraft or other flight equipment by TWA from Toolco contains a specific provision (although variously worded) that it "shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified therein", language which is hardly consistent with Toolco's contention that the terms and conditions of each transaction received full Board approval.

The Creation of the Voting Trust

In December 1960 the defendants finally agreed to outside financing for TWA in the amount of $165,000,000, on

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When dealing with the issue of a possible further acquisition of control of TWA by Toolco, the Board adopted a quite different approach. Thus, in Order No. E-11432 the Board ordered that:

> "Any additional acquisition of control of TWA by Toolco as may result from the agreement presented herein, be and is hereby approved, provided that such additional control, if any, shall be exercised in accordance with the terms and conditions of [the original *Control Order*]." (A-194)

The slight variation in Order No. E-13334 ("That any additional control of TWA by Hughes as may result from the transactions * * *") does not seem to have intended any different effect (A-198).

The one remaining significant variation is found in Orders No. E-15430, No. E-15561, and No. E-16195 wherein the Board specifically ordered:

> "That TWA be and it hereby is exempted pursuant to Section 416 from the requirement[s] of section 408 to the extent necessary to enable it ['to purchase the instant aircraft and equipment from Toolco, a person engaged in a phase of aeronautics' (No. E-15430), 'to purchase two additional jet aircraft and five engines from Toolco, a person engaged in a phase of aeronautics' (No. E-15561), and 'to consummate the jet aircraft equipment purchases described and set forth in the motion herein' (No. E-16195)]." (A-214, A-217, A-226)

Such explicit exemptions pursuant to Section 416 were given to TWA, not of course to Toolco.

terms which, by that time, were far less favorable than those which TWA could have obtained in earlier years. As a part of the 1960 arrangements Toolco's common stock in TWA was placed, on the insistence of the financial institutions providing the money, in a voting trust. In its order approving these arrangements the Board described the voting trust as providing "measures of assurance regarding the management policies of TWA during the period the securities are outstanding" (A-221).

The Board went on to indicate its understanding of the reasons why the banks and insurance companies had found it necessary to seek this protection or assurance with respect to the management policies of TWA:

> "We have not been told officially of the reasons which motivated the decision of the insurance companies and banks to seek this protection. However, we have not been unaware of TWA's problems.
>
> "For example, it is a matter of public record that TWA's major competitors arranged the financing for their jet fleets at a significantly earlier date than did TWA. The impact of this fact may be indeed far-reaching. This may have meant that those carriers obtained their financing at a time when funds could be raised on relatively more attractive terms. In any event, it is clear that TWA will pay substantially higher interest rates for its funds than its major competitors. The fact that this disparity in debt burden can play a significant part in the competitive picture is certainly clear.
>
> "Moreover, it is probable that the delay in arranging financing has also prevented TWA from securing delivery of a substantially large portion of the jet fleet which was ordered on its behalf. Thus, TWA was unable to take delivery of the twenty Convair 880's, most of which have been available for the past several months. It appears that the failure to receive this equipment as planned may have played a substantial part in TWA's recent inability to maintain its traffic position relative to

its principal competitors. Thus, we note, for example, that the carrier's preliminary traffic reports for the month of November 1960 show that TWA's share of the Big Four domestic passenger market has declined from 23.0 to 20.2 per cent. By way of contrast, United, which was behind TWA, has caught and passed it, increasing its share from 21.3 per cent to 29.0 per cent. It appears to be significant that TWA's major competitors have already taken delivery of much larger jet fleets than TWA is operating and have firm orders for delivery of more.

"Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention." (A-223-24) (Footnotes omitted.)

The Board also recognized that the creation of the voting trust effected an important alteration in the relationship between Toolco and TWA. Thus, the Board pointed out that with the consummation of this plan

"* * * a significant and fundamental change will have been accomplished in the control of TWA by Toolco. Upon the execution of the voting trust, the Toolco control of TWA will change drastically in both form and substance. No longer will the directors of Toolco be free to enforce their dictates or those of Toolco's controlling shareholder on TWA." (A-222)

The Board went on:

"* * * the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board *before Toolco would attempt to reassume control over TWA*. It is clear that such approval would not be forthcoming with-

> out a searching inquiry into the public interest factors affecting this control." (A-224-25) (Emphasis supplied; footnotes omitted.)

With the consummation of these new arrangements, TWA came, for the first time since before 1940, under the control of directors and management interested exclusively in the well-being of TWA. The first step to be taken by this new management was to reverse the policies of the past which had seriously affected TWA's traffic position, as the Board noted in its 1960 order, and which had prevented TWA from keeping pace with the rapid development of jet service in the domestic and international air transportation industry.

The enormity of the task the new management faced in 1961 and the effectiveness with which it met that challenge is underscored by findings contained in the Recommended Decision of Examiner in the *Transatlantic Route Renewal Case*, CAB Docket No. 13577, July 9, 1964, pp. 86-87:

> "Under the control of Howard Hughes, TWA suffered from a lack of continuity in its management from January 1956 to April 1961. During this period, there were only three years, viz., January 1957-January 1958 and July 1958-July 1960, in which the carrier had the benefit of being directed by a duly elected president. That office was either vacant or occupied by an acting president half of the time. TWA was unable to obtain adequate financing and its ability to acquire needed jet-powered aircraft was greatly impaired. Only after the Civil Aeronautics Board approved a voting trust arrangement of the Hughes stock of TWA in 1960 did the financial and equipment problem improve.
>
> "Although TWA introduced jets in its domestic system in the early part of 1959, it was not until the end of the year that three such aircraft were placed in transatlantic service. Pan American, on the other hand, had six jets in transatlantic service in

December 1958, a year earlier, and 13 in operation by December 1959. In June 1960 TWA had nine jets in transatlantic service as compared with 22 for Pan American; and a year later TWA was still operating nine jets in transatlantic service, while Pan American had a fleet of 25 jets.

"It seems clear, therefore, that TWA's relatively greater decline in transatlantic participation cannot be attributed to any deficiency in the route pattern, and this condition should have no bearing on the question of whether the staff's area concept should be substituted for the present route pattern. Since TWA's present management took over in April 1961, free from the handicaps which impeded previous managements, the carrier's participation in the market has increased from 12.6 percent in 1961 to 17.2 percent in 1963."*

The Conduct of the Defendants Since 1960

As the complaint makes clear, the defendants sought to continue their pattern of unlawful conduct and to achieve their unlawful objectives even after the creation of the voting trust in 1960. Thus, during May and June 1961 defendants sought to stop TWA from purchasing jet aircraft from Boeing even though TWA's Board of Directors had already determined, as the defendants knew, that such Boeing aircraft would best meet TWA's pressing need for more jets; instead the defendants sought to compel TWA to purchase 13 Convair Model 990 aircraft

* In anticipation of Toolco's attempt to suggest here (as it previously did in the Court of Appeals) that these conclusions of the Examiner resulted from self-serving contentions made by TWA in a proceeding to which Toolco was not a party, it is clear from the Examiner's opinion (and can be established by an inspection of the record of that proceeding) that his conclusion was based on material submitted by either the Board's staff or Pan American World Airways, Inc., whose interest was adverse to TWA's in the *Transatlantic Route Renewal Case*. The Examiner's conclusion on the route issues —as the quoted analysis indicates—rejected TWA's contention there that its historical competitive weakness entitled it to preferred treatment on route allocations.

from Toolco (Complaint, paragraphs 37, 38, 39, A-18). In efforts to attain their objectives, defendants made threats against TWA, its directors, the voting trustees, and the financial institutions lending money to it, including a threat to institute suit; they sought to interfere in, impair and disrupt the contractual relationship between TWA and Boeing by asserting to Boeing that its contract with TWA, which had not been consented to by Toolco, was not binding upon TWA (Complaint, paragraphs 38, 39; A-18).

During the same period defendants also by additional means sought to impede TWA's purchase and financing of the jet aircraft selected by it. They maliciously communicated to the Securities and Exchange Commission unwarranted objections concerning a Registration Statement which TWA had to file to complete its financing arrangements, and they publicly announced, while a public offering of securities by TWA was in progress, that Toolco proposed to sell 85% of similar TWA securities it was obligated to acquire, with the result that the prices at which the securities offered by TWA could be sold and were sold to the public were decreased substantially (Complaint, paragraphs 40-45, A-19-20). (These securities were in fact sold by Toolco, but more than two years later.) As part of the same unlawful effort, defendants also warned the banks and insurance companies from which TWA was then attempting to borrow $30,000,000 of short-term funds and $147,000,000 of secured funds to purchase the Boeing aircraft, that the voting trust was invalid and that any financing entered into without Toolco's consent would be invalid (Complaint, paragraph 46, A-20).

These warnings and the other threats and public announcements by defendants were made for the express purpose of impairing TWA's efforts to obtain financing from sources other than defendants, so as to enable de-

fendants to continue to condition the furnishing of financing to TWA upon TWA's acquiring jet-powered aircraft only from defendant Toolco.*

The History of This Litigation

On June 30, 1961 TWA commenced this suit.

There followed nearly two years of proceedings before the District Court, which culminated in the entry of the default judgment. During this period defendants conducted what may be accurately characterized as a complex, persistent, and ingenious campaign, the aim and result of which was to foreclose plaintiff from discovery of evidence on the vital subjects of Hughes' and Toolco's activities in the areas of financing and aircraft acquisition —the gravamen of TWA's complaint. It is the last step in this campaign, the refusal to produce obviously significant documents and the refusal of Howard Hughes to appear for the taking of his deposition, that petitioners now describe as an "election to rest on its positions" (Petitioners' Brief, p. 10). Aware of the obvious inadequacy of this theory of "election" to explain their behavior in the District Court, petitioners take the further position that in the course of proceedings vigorously contested for nearly two years (a) nothing worthy of attention occurred anyway and (b) the contest was in the wrong arena. The history of the proceedings reveals this pose to be pure sham.

In the initial phase of the litigation Toolco filed various notices of deposition (fol. 76-91) and obtained the priority of discovery normally accorded to a defendant under the

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* A verbatim transcript of a telephone conversation between Hughes and Holliday a few months previously appears in the record at T-58. In it Hughes directed Holliday to tell Convair that he would see to it that TWA bought Convair 990s—how he would do it, he said, was his business, although he quite plainly assumed that he could attend to this upon regaining control of TWA. While never illuminated by further inquiry, as it stands it quite adequately explains the purpose of these obstructive maneuvers.

then prevailing practice in the Southern District of New York (A-85, fol. 586-87). It then used that priority for the purpose of enmeshing the proceedings in an endless exploration into irrelevancy, the effect of which was to make it appear that the record, which defendants themselves were solely responsible for creating, was barren of information in support of plaintiff's complaint. As an early step in Toolco's discovery, a subpoena *duces tecum* was served upon TWA (fol. 586-87) requiring the production of an enormous volume of documentary material (copies of almost all of which were later found to be already in Toolco's files). On August 8, 1961, just prior to the service of that subpoena, Toolco moved to dismiss TWA's complaint (fol. 276-402).

The various priority and other motions filed by the parties during the period immediately following service of TWA's complaint required the attention of no fewer than six District Judges. The submitted papers alone included hundreds of pages of material. Due to the complexity of the case and the burden on the Court, on August 31, 1961 Hon. Charles M. Metzner was appointed Judge for all purposes to supervise the conduct of the proceedings (fol. 581). All matters then pending became the subject of a lengthy pre-trial conference before Judge Metzner on September 6, 1961 (fol. 616-69). This was the first of 19 formal pre-trial hearings that were held before Judge Metzner. There were, in addition, other conferences in chambers of which no record was kept.

The Court, in a hearing that took up some 52 pages of transcript, was asked to consider Toolco's motion to dismiss the complaint, in support of which Toolco had filed 126 pages of papers (thus converting it into a motion for summary judgment) (fol. 276-402), most of which were formally withdrawn a year and half later in an attempt to preclude TWA from bringing in material relating to the merits (fol. 2711). In addition, argument

was had as to the production of documents and a general schedule for the taking of depositions. Counsel for Toolco also noted that it planned to counterclaim against TWA and others and would not wish to press further its motion as to the complaint until after it had answered and pressed its counterclaims. In the same breath Toolco's counsel virtually withdrew the motion until after Toolco had completed its discovery proceedings (fol. 648-49). On September 7, 1961 the Court ruled that Toolco's motion "be held in abeyance" until *defendant* shall notify the Court when it desires the motions to be heard (fol. 586-87).

While TWA began the massive job of searching its files and producing documents in response to Toolco's subpoena (a procedure which required documents to be reviewed in cities across the nation and occupied counsel for several months), a second pre-trial conference was called for October 2, 1961 before Judge Metzner.

That conference dealt with TWA's motion under Rule 34 for documentary discovery from Toolco (fol. 670-704). TWA demanded discovery of certain tax documents as part of the overall production of documents it sought from Toolco. The necessity of establishing an early deposition date for Hughes, in light of his complete dominance over defendants' activities and over those of TWA in the field of aircraft acquisition and finance, was also urged by TWA. Toolco vigorously opposed TWA's motion on the ground that it should be allowed to complete its entire discovery proceedings before TWA could begin.

Thus Toolco's intransigent resistance to Hughes—or anyone else—being deposed by plaintiff and to the making of any discovery of its most significant documentary records had solidified as early as these first pre-trial conferences. As will be seen below, when that position was attacked by order of either the Special Master, the District

Court, or even the Court of Appeals, Toolco's attitude was either to ignore the orders or to defy them.

During the fall of 1961 TWA produced the documents called for by Toolco's subpoena, and on December 5, 1961 the Court ruled that Toolco must submit to documentary discovery in accordance with TWA's motion pursuant to Rule 34. Specifically, the Court ruled that the financial and tax information sought by TWA was relevant and should be produced (R. 1-2). On December 18, 1961 the Court ordered production by Toolco to begin on March 15, 1962 and set January 5, 1962 as the date depositions noticed by Toolco were to commence (R. 1377-78).

The deposition proceedings conducted by Toolco began, as scheduled, on January 5, 1962 with the taking of TWA's deposition by its president, Charles C. Tillinghast, Jr. (fol. 5428). On February 7, 1962, the Court, concerned with having the depositions proceed expeditiously, appointed former Solicitor General J. Lee Rankin as Special Master. In the same order the Court set out the deposition schedule it anticipated would be followed. Thus, the proceedings were to continue with the Tillinghast deposition on February 13, followed by depositions of other TWA officers and then by a host of other Toolco-noticed depositions which included 10 corporations and 20 individuals. All of these were to be completed by April 23, 1962, a time schedule in accordance with Toolco's notices, at which time TWA was to begin depositions of Hughes and others (A-139-43).

In February 1962 Toolco filed its answer and so-called counterclaims, the nub of which admitted that TWA had been grievously injured by the delays in its aircraft acquisition program and the financing therefor, but sought to shift the blame for TWA's injuries to the additional defendants (A-31-84). This opened the second phase of the proceedings. The additional defendants, already in attendance at the depositions after notice of their pend-

ency from the Special Master, were also required to produce masses of documents for Toolco's inspection. The enlargement of the proceedings required another extensive pre-trial conference with the Court on February 23, 1962 to straighten out questions arising out of the additional defendants' presence in the action (R. 2-36).

TWA charged that Toolco was using its depositions to delay proceedings and to discover information relating to its counterclaims. TWA pointed out that the Tillinghast deposition was still in progress, even though Tillinghast had been employed by TWA only a few months prior to the filing of TWA's complaint and had no personal knowledge of the events of the preceding years. TWA requested that this deposition be terminated. The Court, on March 5, 1962, ordered Toolco to limit its examination to the scope of the complaint (A-86-87) but refused, at that time, to terminate the Tillinghast deposition.

Shortly after filing its complaint, TWA undertook a vast international search in an unsuccessful effort to locate Howard Hughes. After all efforts in this direction had failed, TWA applied to the Special Master for permission to serve limited interrogatories on Toolco as to the location of Hughes, its 100% stockholder and admitted managing agent.

Toolco vigorously opposed TWA's right to serve the interrogatories, but after submission of briefs and extended oral argument the Special Master, on April 17, granted TWA's application, directed that any appeal by Toolco be taken within 10 days and specified that the interrogatories be served on May 2, 1962 (R. 60). No appeal was taken by Toolco, and on May 2 TWA served its limited interrogatories on Toolco requesting answers thereto by May 17 (R. 37-44). Toolco then objected both to the form of the interrogatories and to TWA's right to serve them at all. The Special Master took further briefs and heard additional oral argument but on June 4 ordered

Toolco to answer no later than June 20, 1962 (R. 1047-48). Three days later Toolco appealed the order to Judge Metzner, but placed no return date on its papers (fol. 27680-83). Then, on June 11, it attempted to reargue the point before the Special Master. On June 14, Toolco's attempt to reargue was rejected (R. 59-62). Although not relieved by either the Special Master or the Court from compliance with the June 20 deadline, Toolco neither answered the interrogatories nor took any other action on them.

Meanwhile on March 15, 1962 Toolco had commenced production of documents in accordance with the court order of December 18, 1961. Production was to be made in Houston, Los Angeles and elsewhere. However, TWA counsel were initially refused admission to the key Los Angeles site (the Hughes message center), and only after strong admonitions from the Special Master did production in Los Angeles belatedly begin.

TWA was aware that it was regular practice for defendants to use attorneys as business agents and negotiators for all important matters. Noting from an initial examination of documents produced by Toolco that no documents relating to the important areas in which these agents functioned had been produced, TWA and the additional defendants sought to obtain such documents. They asserted that defendants had waived any attorney-client privilege as to these documents on the ground that defendants had used affidavits of these attorneys as to questions of fact both in the litigation and in an unrelated matter concerning Northeast Airlines pending before the CAB. In addition, defendants had pleaded advice of counsel as a defense in the action, and the scope of the activities of these attorneys as business representatives of Hughes and Toolco further militated for a finding of waiver. If Toolco were allowed to withhold these documents, the most significant documentary evidence of

defendants' aircraft and financing activities would be unavailable.

After very extensive briefs and arguments the Special Master, on April 17, 1962, ruled that Toolco must produce the documents (AA-95-115). Toolco then appealed the ruling to the Court. Substantial briefs were submitted on the appeal, and on May 17, extended oral argument was heard by the Court (fol. 24570-612). On July 24 the Court ruled that Toolco had waived its privilege. Toolco completely ignored the Court's decision (AA-116).

Meanwhile on June 25, 1962 TWA again moved to terminate the Tillinghast deposition, which was still in progress with no end yet in sight (fol. 26694-700). On July 12 another lengthy hearing was held before Judge Metzner to determine whether the Tillinghast deposition should be terminated, whether depositions should be alternated so that TWA could commence its discovery without waiting for Toolco to exhaust all possibilities of delay, and whether Toolco had to answer the interrogatories asking the whereabouts of Hughes which it had previously been directed to answer no later than June 20, 1962. The Court ordered that the Tillinghast deposition be terminated no later than July 25. Judge Metzner also modified and affirmed the Special Master's ruling as to the interrogatories seeking the location of Hughes, directing that they be answered by July 26; he rejected the proposal of alternating depositions, with leave to renew the application in September (AA-88-89).

On July 18, 1962 Toolco moved the Court to clarify and limit its order with respect to the interrogatories as to Hughes' location (fol. 1438-40). This motion was denied on July 23 (fol. 1440). On July 26 (the return date), however, Toolco applied to the Court for additional time to answer the interrogatories and was given until August 27, 1962 (fol. 1453-76, R. 59-66).

On July 27 Toolco informed TWA that it had received authority to accept service of a subpoena on behalf of Hughes, a position it confirmed by letter of August 1, 1962. Toolco, however, refused to show its purported "authorization" to TWA, but mailed a copy to Judge Metzner (R. 65). At the same time Toolco sought to reargue its position vis-a-vis the assertedly privileged documents—none of which had yet been produced, although Toolco had previously been directed by the Court to produce them.

TWA, which had been shown no "authorization" to accept service for Hughes, continued to seek him. On August 17, 1962 attempted service in California was again unsuccessful, and TWA counsel left its subpoena with the Office of the United States Marshal in Los Angeles. TWA decided to await Toolco's answers to interrogatories which had been most recently ordered to be filed by August 27, 1962.

On August 21 the Court returned the "authorization" to Toolco's counsel noting that it was "returning what you say is a written authorization from Mr. Hughes" and stating that it expected Toolco to obey the Court's order of July 26 concerning answers to the interrogatories. Thereafter, Toolco sent a copy of the "authorization" to TWA. TWA replied that it awaited Toolco's answers to the interrogatories. On August 27, Toolco informed TWA that it had no intention of answering the interrogatories (R. 45-58).* TWA, on August 28, moved the Court for appropriate relief (fol. 1491-93).

The final phase of the proceedings in the District Court began with a pre-trial conference before Judge Metzner on September 6, 1962, held to consider TWA's motion with respect to the interrogatories (R. 1379-88). That morning, at about 7:30 (evidently prior to the normal hour of opening the office), Toolco's counsel had appeared at the

* Toolco *never* answered them.

U. S. Marshal's Office in Los Angeles, presented a copy of the "authorization", and "accepted" the subpoena for Hughes. A return of service was made by the Deputy Marshal reciting these events (fol. 1604-09). Concerned that a question might later be raised as to the effectiveness of the "authorization" to bind Hughes or Toolco, however, TWA had submitted the "authorization" to analysis by a handwriting expert (Charles Appell, for years relied on by the United States Government in similar matters). At the hearing before Judge Metzner in New York, TWA informed the Court of this and that the signature of "Howard R. Hughes" thereto was a forgery (B-34-43, R. 68-70). Toolco subsequently denied the charge of forgery and submitted an affidavit executed by a Notary Public in California to the effect that Hughes had appeared before the Notary, confirmed the authorization and given authority for it; no actual signature of Hughes was ever submitted, however (fol. 1574-739). The Court reserved decision on these extraordinary happenings pending further developments.

TWA then moved before the Special Master to confirm September 24, 1962 (the return date of the subpoena which Toolco's counsel had purported to accept) as the date for Hughes' examination (fol. 26930-31).

On September 15, 1962 the Special Master denied TWA's application to take Hughes' deposition beginning September 24, but said:

> "I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena • • •."
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> • • •
>
> "• • • I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what

> I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of authorization or failure to respond to the subpoena * * *." (R. 1227-28)*

After yet another review of the question of Toolco's assertedly privileged documents, the Special Master on September 15, 1962 again ordered Toolco to produce them. The next previous order for their production had been that by the District Court on July 24, never modified or set aside, but ignored by Toolco. Toolco again appealed to the Court.

On September 21, 1962, after another hearing, the Court modified the ruling of the Special Master and set the date of the Hughes deposition for October 29, 1962. The Court stated:

> "The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena or failed to appear pursuant to that subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.
>
> "Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions

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* On February 8, 1963, counsel for Toolco stated with respect to this decision of the Special Master:

> "* * * the Tool Company did not seek a review of those rulings of the special master by the Court and accepted in effect the responsibility placed upon it by that ruling." (AA-167)

> expressed by the Special Master. Any determination by the Special Master on an application for a default judgment would, of course, be reviewable upon appeal to the court." (B-46)

Toolco's deposition proceedings, meanwhile, went ahead slowly, and two additional TWA officers and one former officer were partially examined (A-471, A-570, A-579). By the time discovery proceedings were halted, Toolco had spent an entire year in the process and 13,000 pages of testimony had been compiled. The result of all this was one deposition completed, one ordered halted after months of delay and forays into irrelevancies, and two uncompleted.

After the Court's ruling on September 21, Toolco embarked upon yet another series of obfuscating tactics, the aim of which was to frustrate the taking of Hughes' deposition by TWA and the additional defendants.

Thus, on September 25, 1962 Toolco moved for a pretrial conference under Fed. R. Civ. P. 16 to define and narrow the issues—at a time when TWA had not been able to take a single deposition and still lacked important documentary information which Toolco continued to refuse to produce (fol. 1914-22). Then on October 11, Toolco served on TWA the first set of its massive interrogatories which, when added to the second set served on November 13, included thousands of questions (fol. 2214-324, fol. 27491-566).

On October 22, 1962 Toolco again moved to adjourn the Hughes deposition then scheduled for October 29 (fol. 27082-83); on October 25 the Special Master set February 11, 1963 as the definitive date for Hughes' examination. In setting that date, the Special Master expressly noted that he was giving Toolco time to present whatever motions it wished to the Court (B-460). Although Toolco was expressly cautioned that any appeal from the ruling should be taken within 10 days, Toolco did not appeal.

Then on December 4, 1962 Toolco moved to depose additional defendants Dillon Read and Sessel and Irving prior to any deposition of Hughes (B-503). The Special Master, undoubtedly mindful of the time Toolco could consume and had consumed in deposition proceedings, denied the motion on December 28 (B-466). In this decision the Special Master noted that he considered the February 11, 1963 date for Hughes' deposition a firm one and wished "that there may be no valid basis for misunderstanding it" (B-464). Toolco appealed that decision to the District Court.

On January 10, 1963 the District Court

—denied Toolco's motion to depose Dillon Read, Sessel and Irving prior to Hughes' deposition (A-90);

—denied Toolco's Rule 16 motion with leave to renew after the deposition of Hughes (A-92);

—directed that TWA need not answer Toolco's interrogatories until 30 days after completion by TWA of the deposition of Hughes (A-93-94); and

—affirmed once more the ruling of the Special Master as to the assertedly privileged documents and ordered Toolco to produce such documents by noon, January 14, 1963 (A-92).

As to the Hughes deposition the Court stated:

> "The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances." (A-91)

None of this quelched Toolco's efforts to escape discovery. The documents were not produced. Toolco, however, made application to the Court of Appeals for leave to file a writ of mandamus seeking review of all the orders of

the District Court and for a stay of proceedings. On January 23, 1963, after a hearing and the submission of papers on the motion, that Court denied Toolco's application (fol. 3851).

Meanwhile, on January 14, 1963, Toolco moved "in the alternative" to hold Hughes' deposition on written interrogatories or finally to bring on its motion (pending since August 8, 1961) to dismiss the complaint or for summary judgment (fol. 2496-515).* On January 19, the Court denied the motion to depose Hughes on written interrogatories but agreed to hear Toolco's 1961 motion (AA-120-22). A briefing schedule was set for the motion designed to afford Toolco the maximum possible time for preparing its papers without jeopardizing the February 11 date for the commencement of TWA's discovery. The Court also instructed Toolco to advise TWA and the additional defendants by January 22, 1963 if it wished them to conduct the Hughes deposition at a location other than the Federal Court House in Los Angeles as specified in TWA's notice (AA-121-22). No such advice was given and TWA undertook extensive and costly preparations for the examination of Hughes, including the dispatch of numerous attorneys and large quantities of documents to Los Angeles and the leasing of office space (R. 1390-92).

As part of the preparation for Hughes' deposition TWA and the additional defendants again sought discovery of further tax returns, revenue agents' reports, accountants' work sheets and related memoranda which had never been produced despite the Court order of December 18, 1961 requiring their production.

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* The fact that the requests that Hughes be deposed by written interrogatories and to bring on the motion to dismiss were presented "in the alternative" provides an interesting insight into defendants' strategy. It is obvious that the motion to dismiss was thought of as merely another tool which might be used to prevent the oral deposition of Howard Hughes. If the deposition could be taken on written interrogatories, then the motion to dismiss would be unnecessary.

The Special Master, after extensive argument, ruled on January 22, 1963 that the documents were relevant to the case and that they should be produced. He ordered production to commence on January 30, 1963 so that counsel could prepare for Hughes' examination (B-237-47). On February 1, 1963 the Court affirmed the Special Master and ordered production to start immediately (AA-143-44). Toolco refused to produce the tax documents, as well as those over which privilege had been asserted, notwithstanding the various orders that they be made available, and notwithstanding the intervening refusal by the Court of Appeals to review those orders on an extraordinary writ.

On February 1, 1963 Toolco served its papers on its motion to dismiss (withdrawing its summary judgment motion). On February 2, 1963, TWA served its answering papers. On February 6 oral argument was had, and Toolco's motion was denied, with a formal opinion issuing on February 7, the next to last business day before February 11 (A-118-29). In order to give Toolco a further opportunity to seek interim relief by application to the Court of Appeals, Judge Metzner stayed all discovery proceedings until 5 P.M. on February 8, 1963 (A-129). Toolco made no such application.

On Friday, February 8, 1963, the last business day before the scheduled examination of Hughes, Toolco informed Judge Metzner in open court, shortly after 5:00 P.M., that it had made a "business decision" not to proceed further. Counsel indicated that Toolco was fully aware of the sanctions available to TWA for such a deliberate refusal to comply with the several orders of the Court (A-130-31, AA-190-99).*

* Petitioners suggest that Toolco's election to "rest on its positions in order to obtain appellate review of decisions it deemed erroneous" is akin to the position taken by the United States in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 680-81 (1958). (Petitioners' Brief, p. 10, note 8). The crucial difference, however, is that in the

The end of the road was finally reached in May 1963. It had taken almost two years, consumed thousands of pages of deposition testimony, with hundreds of thousands of documents produced by all parties, 19 formal pre-trial conferences before Judge Metzner encompassing some 800 pages of transcript, not to mention the six judges who functioned prior to Judge Metzner's appointment, scores of hearings before the Special Master, a hearing before the Court of Appeals and an incredible international hunt for Hughes which invoked the time of the District Courts in California, New York and Florida as well as attorneys throughout the United States, Mexico and elsewhere.

The result of all this was a deliberate refusal to produce the most needed documents and the only witness with full knowledge of all the facts. In sum, what Toolco denied to TWA was the information which bore on the very heart of the complaint—Hughes' and Toolco's activities concerning financing and aircraft acquisition.

Following appropriate motions by TWA and the additional defendants, the Court on May 3, 1963 filed opinions and orders granting a default judgment to TWA on the complaint and dismissal of Toolco's counterclaims with prejudice. After summarizing the record upon which

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Procter & Gamble case, the Department of Justice refused to comply with the discovery order and allowed the complaint to be dismissed because it regarded the ***discovery order itself***, requiring production of grand jury minutes, as being improper. There is no possible room for argument here as to the propriety of Judge Metzner's orders directing that a deposition be taken and directing that documents be produced. Petitioners refused to comply with that order, allegedly, as a device to secure a review of questions disposed of by an earlier order which was ***not*** subject to review. In point of fact, a familiarity with all of the petitioners' strategems before the Special Master and the District Court reveals that the real motivation for the refusal to comply with the discovery orders was a fear of what that discovery would disclose.

TWA's motion for entry of a default judgment rested (A-132-35), the Court said:

> "It is clear that the deposition of Hughes [*] is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful * * *." (A-135-36)

The Court of Appeals commented that "* * * Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute" (R. 1434).

The Northeast Control Case

In the meantime, the Civil Aeronautics Board was again concerned with Toolco and Hughes—in the so-called *Toolco-Northeast Control Case* (CAB Dkt. 11620). Upon a complaint by National Airlines that Toolco and Hughes were violating Section 408 of the Federal Aviation Act by their activities in connection with Northeast Airlines, the Board entered Order No. E-15532 on July 12, 1960, initiating an investigation into whether Toolco and Hughes had unlawfully acquired control of Northeast.** Subsequently, on January 8, 1962, Northeast, Toolco and Atlas filed a joint application with the Board for approval of the acquisition by Toolco of Atlas' controlling 56% inter-

* The Court had earlier noted that the refusal to obey its orders to produce documents was "embraced within the refusal to proceed with the deposition of Hughes" (A-135).

** TWA, while still under Hughes' control in 1960, was originally included in the Northeast investigation pursuant to Order E-15532. However, the Board, by Order E-17675, November 8, 1961, p. 5 n. 6, dismissed the investigation as to TWA. TWA was not a party and except as noted herein played no part in the proceeding. Toolco,

est in Northeast. On February 7, 1962 a number of issues for the Northeast proceeding were outlined in advance of the hearings (Appendix 1 to Report of Pre-Hearing Conference, February 7, 1962) (R. 773). One such issue concerned possible violations by Toolco of the Federal Aviation Act or of the Board's 1944 control order regarding TWA. Another issue concerned the effect that Toolco control might have on the "'honest, economical and efficient management' of Northeast" (R. 774).

On March 28, 1962 the Board's staff served subpoenas on TWA and some of its officers in the Northeast control proceedings, seeking information on the prior relationship between Toolco and TWA. This was at the time when documentary discovery by Toolco to TWA had just begun in the instant litigation (see p. 43, *supra*), and the Board's staff thereafter requested TWA to furnish relevant documents to it as they became available. On April 16, 1962, however, the Board's staff informed TWA that its cooperation would no longer be required. In a letter to TWA's counsel (appended hereto as Annex B) the staff explained that:

> "* * * the Hearing Examiner ruled out any investigation into the economy or efficiency of Toolco's management and control of TWA. With this issue out, and with the antitrust litigation in its present posture, we did not deem it necessary to press forward on other issues * * *."

Previously, on April 9, 1962, the Board's staff had by letter described to the Examiner the general areas of inquiry it wished to pursue. The letter (available in the public record of CAB Docket 11620) first made clear

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however, has since attempted to use the *Northeast* case to obtain *ex parte* from the Board a ruling that would permit it to reassert control over TWA ("facilitating", in the Board's euphemistic phrase, the "termination" of the TWA-Toolco controversy, Order E-21057) without any hearing ever being held before any tribunal at which it might be possible for TWA to establish its right to redress.

that the staff had no intention of litigating the issues in the TWA-Toolco antitrust suit:

> "The Bureau does not intend to attempt to prove, or disprove, either the allegations of the complaint or those of the counterclaim. To do so is not essential to a disposition of this proceeding. In addition, it would inevitably result in a long, drawn-out hearing which might have extremely adverse consequences for Northeast."

After concluding that the antitrust charges should be left "for other times and other forums", the staff indicated it would concentrate its attention on the mismanagement aspects of the Toolco-TWA situation and especially on self-dealing and conflicts of interest. As the letter pointed out:

> "Obviously, potential conflicts of interest were inherent in the relationship between TWA, an airline 78 per cent owned by Toolco, and Hughes/Toolco, who apparently were dealers in commercial aircraft."

Areas of inquiry which the staff felt necessary were listed:

> "Most fundamentally, however, we intend to inquire into whether Mr. Hughes, by reason of his widespread interests, insistence upon direct exercise and control of decision-making power, and inability, for whatever reasons, to make decisions with the required firmness and speed, ran TWA in a manner inconsistent with economic and efficient management (and therefore inconsistent with section 102 of the Act), and whether he could be expected to operate Northeast in the same fashion. We believe that the evidence will tend to show that, for many years, Mr. Hughes insisted upon retaining control of equipment, design, manufacture, acquisition, disposal and financing; that he at times injected himself into areas of the day-to-day operations of the airline, notably its advertising; that, because of his widespread other business interests,

> or for other reasons, he was unable or unwilling to make decisions on these matters at opportune times; that he consistently failed to delegate this decision-making power to the officers or directors of TWA, who would, under normal management-stockholder relations, have exercised these functions; that in so doing, he abused the legal rights of TWA and its minority stockholders; that, for these and other reasons arising out of the management-stockholder relationship, TWA was unable to retain chief executive officers; and that, as a primary result of the conduct of Hughes/Toolco, the economy and efficiency of TWA were seriously damaged. More specifically, we believe the evidence will tend to show, among other things, that Hughes/Toolco prevented TWA from taking advantage of favorable market conditions to secure additional equity financing; that TWA's financing was eventually arranged at a cost significantly higher than that of its major competitors; and that TWA was put at a serious competitive disadvantage because of its inability to secure jet aircraft at the same times and in comparable quantities as its competitors."

The staff was, however, overruled in its desire to inquire into the areas it thought critical. The Examiner took the position that the key question in the *Northeast* case—indeed, the only question—was whether Northeast would survive, absent financial support from Toolco. Since the answer seemed clearly negative, he excluded evidence of Toolco's past mismanagement of TWA. The Examiner ruled that evidence of illegality might be admitted, but narrowed the area of this inquiry by agreeing with the staff that possible violations of the antitrust laws by Toolco were not a proper subject of inquiry. The position taken by the staff and the reasons why they concluded that the Examiner's ruling effectively precluded them from inquiring into even the limited area he had designated as open to inquiry are fully set out in the brief

thereafter filed by the staff with the Board, excerpts from which are annexed hereto as Annex C.

In affirming the Examiner's decision permitting Toolco to acquire control of Northeast, the Board noted that he had excluded evidence of Toolco's previous uneconomic and inefficient management of TWA as being "a waste of time and effort" and ruled that "the condition of Northeast and the necessity for immediate help made the basic issue not whether Toolco would provide an efficient management, but whether Northeast would have any management at all." *Toolco-Northeast Control Case,* CAB Order No. E-18470, CCH *C.A.B. Cases* (*1960-1964*) ¶21,292, p. 14,852 (1962) (R. 833-46), *aff'd sub nom., National Airlines, Inc.* v. *Civil Aeronautics Board,* 321 F.2d 380 (D.C. Cir. 1963). The Board also made it plain that it was not passing upon the propriety of Toolco's past management of TWA, but that such an inquiry would be pertinent in connection with any "resumption of control of TWA" by Toolco:

> *"Should the question of resumption of control of TWA come at some future date before the Board and an inquiry be sought into the efficiency and economy of Toolco's past management of TWA, the materiality of such evidence in that case will be determined at that time.*
>
> • • • • •
>
> "Our findings here are limited to the control relationship presented by the Purchase Agreement that is before us. *We have not considered nor do we pass upon* either the route issues in the *New York-Florida Renewal Case,* or *any public interest issues that may arise in connection with any future resumption of Toolco control of TWA."* (*Id.* at p. 14,853) (R. 843) (Emphasis supplied.)

In affirming the Board's decision, the Court of Appeals for the District of Columbia Circuit also noted that the Board and Examiner had not pursued the question of efficiency and economy of Toolco's management of TWA,

that it was not possible to determine from the record whether a fuller inquiry might establish violations of law by Toolco with respect to TWA, and held that the Board was justified in concluding that in that case the "real issue" before it was whether the public interest would be better served by the acquisition of Northeast by Toolco than by the bankruptcy of Northeast (321 F.2d at 385).

Recent Developments

After Judge Metzner had entered his order directing that a default be entered against Toolco and a reference be held to determine the amount of damages to be paid to TWA and his order dismissing Toolco's counterclaims with prejudice, and after these orders had been affirmed by the Court of Appeals for the Second Circuit in the decision now on review here, Toolco sought to circumvent the results obtained in this litigation by reacquiring control of TWA through the purchase of certain TWA securities from their present holders, for approximately $108,000,000. In pursuit of this objective, Toolco applied to the Board either to disclaim jurisdiction or to grant such authorizations or approvals as might be required under Section 408 of the Act to permit it to acquire the outstanding notes

> "• • • the effect of which acquisition will be to permit Toolco to name the voting trustees of the presently existing voting trust with respect to the stock of TWA of which Toolco is the beneficial owner (the 'Voting Trust') or to terminate the Voting Trust if it so desires."

TWA, of course, opposed Toolco's motion, and National Airlines and Eastern Airlines each filed a petition for leave to intervene.

Despite the fact that in its 1960 opinion approving the voting trust it had indicated that it would anticipate the proper filing of an application under Section 408

before Toolco would attempt *to reassume control* over TWA and that such approval would not be forthcoming without a searching inquiry into the public interest factors affecting this control, and despite the fact that, even more recently, in its opinion in the *Toolco-Northeast Control Case* it had referred to the possible *"resumption* of Toolco control of TWA" and the public interest factors to be considered at such time, the Board granted the application on July 10, 1964 to the extent of declaring that Toolco might exercise its option to acquire the TWA notes at such time as it submitted a plan satisfactory to the Board which would effectively divest Toolco of the power to control TWA and Northeast simultaneously. Despite its prior statements to the contrary, the Board concluded that, even if it assumed that "Toolco temporarily lost all power to control TWA during the period of the voting trust, this fact would not have effected a termination of the Board's prior approval of the Toolco control of TWA under the unique circumstances present here."

The Board took this action without any briefs or oral argument, without any hearing whatsoever, and without even any notice in the Federal Register that it intended to dispose of Toolco's application without a hearing, all of this in the face of the express language of Section 408(b) of the Federal Aviation Act that:

> "Any person seeking approval of a [transaction] * * *, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the [transaction] * * * and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing."

TWA immediately sought review of this order in the United States Court of Appeals for the Second Circuit,

and that Court, in a unanimous opinion by Judge Hays, held:

> "• • • that the Board should have held a hearing before issuing its order permitting Toolco to resume control of TWA and that the declaratory ruling was an abuse of the Board's discretionary power." *Trans World Airlines, Inc.* v. *Civil Aeronautics Board,* 339 F.2d 56, 62 (December 7, 1964).

The Court held that a hearing was required by Section 408(b). Petitions for rehearing with respect to that decision were denied February 11, 1965.

The Rulings Below

Two rulings by Judge Metzner are particularly relevant on this review. First, of course, is the ruling appearing at A-132-36 which was the basis of the appeal to the Second Circuit. In that ruling Judge Metzner reviewed in detail the proceedings leading up to Toolco's refusal to proceed, and concluded that the entry of a default judgment against the defendants was appropriate.

Also relevant is Judge Metzner's earlier opinion denying the defendants' motion to dismiss the complaint (A-118-29). Defendants' contentions in support of that motion were substantially the same as they are here. They argued to Judge Metzner that the Civil Aeronautics Board had primary jurisdiction over the conduct alleged in the complaint, that the conduct had been exempted from the antitrust laws by previous Board orders, and that, in any event, the complaint failed to state a claim. In disposing of the exemption argument Judge Metzner ruled that:

> "These orders did not give Toolco a license to engage in other acts that may normally be forbidden by the antitrust laws. What has been approved and exempted is the fact of 'acquisition of control' not activities engaged in by the controlling party

subsequent to acquisition, which may be illegal." (A-123)

Referring to the Board's 1960 opinion approving the voting trust arrangements, Judge Metzner commented:

> "It is clear from this opinion that the CAB does not look upon Toolco as controlling TWA after December 1960. Thus, anything done by Toolco subsequent to that date has not been approved by orders of the CAB and certainly no exemption exists as to the second claim." (A-125-26)

With respect to the primary jurisdiction argument Judge Metzner ruled as follows:

> "• • • the acts complained of by TWA are acts allegedly done by the controlling party after the acquisition had been approved, not only to the detriment of the carrier in question, but to other carriers and to competitors of the controlling party. This in my view is the distinguishing factor between this case and the *Panagra* case. While the acts charged here could be proper subjects for consideration by the Board in determining whether control of TWA by Toolco was in the public interest, they are not the type of acts over which the Board has exclusive primary jurisdiction. They are not within the contemplation of the regulatory powers granted the CAB. *Cf. Georgia* v. *Pennsylvania R.R., supra.*" (A-127-28) (Footnote omitted.)

Judge Metzner also found that:

> "• • • There is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under rule 12(b)(6)." (A-120)

In a unanimous opinion by Chief Judge Lumbard, the Court of Appeals affirmed Judge Metzner's ruling. This opinion is set out at R. 1413-37; we will not attempt to

summarize it here although particular portions of it will be referred to in the following argument.

Summary of Argument

I.

A. Petitioners' first argument—which pervades their brief and affects all their other arguments—is that the powers of the Civil Aeronautics Board under the Federal Aviation Act are such that they supersede any antitrust remedy against petitioners whatever, no matter how clearly their conduct has violated the antitrust laws and no matter how clearly it has hurt TWA. It is important to bear in mind in considering this argument the difference between the Board's having the right to consider particular matters for some of its purposes, and the Board's having the sole and exclusive right to deal in any way with those matters. Petitioners can prevail here only if they can demonstrate that the anticompetitive conduct alleged in the complaint is the sole responsibility of the Board, to the exclusion of the courts.

The Federal Aviation Act itself reveals that the Board does not have exclusive primary jurisdiction of this predatory conduct. The anticompetitive practices complained of are practices which have restrained competition, not in the air transportation market, but in markets relating to the supply of aircraft and financing to air carriers; neither on the face of the statute nor in the practices of twenty-five years of administration is there any hint that the Board has been given either the exclusive responsibility or, indeed, the power to supervise and regulate these peripheral industries. Section 102 of the Federal Aviation Act, 49 U.S.C. §1302, in mapping out the Board's public interest objectives, refers only to objectives relating to the development and regulation of

air transportation. It provides no guidance for the regulation of aircraft supply or aircraft financing. Section 408, 49 U.S.C. §1378, does not confide to the Board a comprehensive and pervasive regulation of the general conduct of a person engaged in "any other phase of aeronautics" when that person happens to control an air carrier, but rather the more limited function of allowing or vetoing the acquisition of control itself. Section 414, 49 U.S.C. §1384, defining the Board's power to exempt from the antitrust laws, is notable for the narrowness and precise definition of the antitrust exemption authorized. As applied to this case, the only order which can result in an exemption is an order approving an acquisition of control, and the only thing exempted thereby is the acquisition of control itself.

No other provision of the Act in any way extends the Board's exclusive jurisdiction or its power to exempt beyond the limits indicated above. Sections 408(d) and 408(e) merely confirm the Board's fact-gathering and investigatory tools, insofar as those tools are necessary to the performance of the functions contemplated by Sections 408(a) and (b). Section 411, 49 U.S.C. §1381, cannot broaden the Board's power to exempt since it is not one of the sections referred to in Section 414, which contains the sole statutory basis for any antitrust immunity. That section is inapplicable, in any event, for two reasons: first, because it is available only with respect to practices engaged in by an "air carrier, foreign air carrier or a ticket agent"; second, because it provides a remedy only against unfair or deceptive practices "in air transportation or the sale thereof". None of the defendants is an air carrier or a ticket agent and none of the practices complained of is "in air transportation". Even if Section 411 could be construed to apply to the conduct of one controlling an air carrier, it would not, in any event, apply to defendants'

conduct since 1960, for Toolco ceased to control TWA in December of that year.

In sum, the Board's power is limited to approving or vetoing acquisitions of control, and it has no authority to impose sanctions against these defendants for their past unlawful conduct; so it plainly does not have an exclusive right to deal with such practices.

B. The legislative history of the Act emphasizes the narrow limits of the Board's authority in this area. The Federal Aviation Commission had recommended that the absolute bar upon acquisitions of control of air carriers by holding companies or others engaged in a phase of aeronautics, which had been written into the Air Mail Act of 1934, be replaced by a power in the Board to permit some such acquisitions. The Commission believed, however, that the Board's powers in this particular area should be "those of veto rather than of initiation".

Two dominant themes emerge from the Congressional debate on Section 408. The first is the great concern on the part of Congress that effective enforcement of the antitrust laws be assured and *minimum* encroachment on antitrust enforcement be permitted to the Board. "[E]very precaution has been written into the bill so that the antitrust laws and all laws for the prevention of combinations and monopolies shall be enforced" (Senator McCarran). "What I desire to see is the preservation of the opportunity of competition" (Senator Borah). The second theme is that the legislators believed the only power they were giving the Board was to approve or veto an acquisition of control. The proviso on which the debate centered was one barring the Board from approving an acquisition if such approval would have defined anticompetitive effects. In view of the evident concern of Congress lest the Board be permitted to sanction any anticompetitive acquisition, that proviso would undoubtedly have been more broadly drawn to prevent approval of

other anticompetitive conduct had Congress thought it was giving the Board authority to approve anything more than acquisitions. Moreover, the participants in the debate plainly assumed that the only possible anticompetitive effects which conduct approved by the Board might have would be in the field of furnishing air transportation to the public.

The result of the debate was that the provision which had been drawn to bar the Board from approving any acquisition of control which "would result in creating a monopoly or monopolies and thereby *unduly* restrain competition or *unreasonably* jeopardize another air carrier * * *" was revised by eliminating the words "unduly" and "unreasonably". The express purpose of this change was to prevent the Board from having "too much room for unlimited construction". The striking thing is Congress's wariness of giving the Board a discretion which would enable it to impair the effectiveness of antitrust enforcement, even in the field of air transportation over which it was given regulatory powers. In the light of this attitude it is inconceivable that Congress intended to give the Board the broad and exclusive jurisdiction over anticompetitive practices in other fields for which petitioners argue, without even a reference in the debates to the possible consequences of such a step.

C. This Court has consistently held that antitrust exemption is not to be extended beyond the areas marked out by Congress, and that in reconciling the antitrust laws with regulatory legislation the antitrust laws are to be displaced to the minimum extent necessary to make the regulatory legislation work. *E.g., California* v. *Federal Power Commission*, 369 U. S. 482 (1962); *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963). Even where an agency has approved a transaction as being in the public interest after weighing antitrust considerations

along with other factors, this Court has held that the transaction may remain subject to antitrust attack. *United States* v. *Radio Corporation of America*, 358 U. S. 334 (1959).

There are only two kinds of cases in which primary or exclusive agency jurisdiction has been found: first, where Congress has clearly and explicitly authorized an administrative agency to exempt the very conduct at issue from the antitrust laws; second, where the agency is charged with administering a regulatory scheme in which a prime requisite is a uniformity or coherence which sporadic judicial action would destroy or impair. The decision in *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963), (*"Panagra"*) falls in this latter category, as is made plain by this Court's reliance on *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), and *Keogh* v. *Chicago & N.W. Ry.*, 260 U. S. 156 (1922), cases in which private actions to recover damages resulting from the charging of unreasonable rates were precluded to avoid disruption of the system of uniform rates administered by the Interstate Commerce Commission.

The result in *Panagra* flowed from the coincidence of several factors not present here. In *Panagra* the Board, like the Department of Justice, was charged with protecting the public interest and the Board was capable of dealing just as broadly and just as flexibly as could the courts with the matters as to which the Department was seeking injunctive relief. Here relief is sought by a private party who has been held entitled to damages, and the Board can provide neither damages nor any other effective remedy. In *Panagra*, the issues went to problems of route structure and common carrier-air carrier relations which are at the heart of the air transportation industry, which the Board is charged to regulate. Here the unlawful practices complained of affect competition in

aircraft supply and aircraft financing, industries not regulated by the Board. Finally, in *Panagra*, the relief which the Department of Justice sought would have had an impact on, and might have disrupted, the coherent route system developed and administered by the Board. An award of damages to TWA here will affect neither routes nor rates nor any other system or structure in which uniformity or coherence is important.

D. By conceding in their Petition for Certiorari that only the Court, and not the Board, can award damages, petitioners conceded that the most to which they could have been entitled was therefore a stay and, in effect, that the default order must be affirmed. For even if petitioners had been entitled to a stay, its denial would clearly not have deprived the Court of jurisdiction to enter its default order when they refused to proceed with discovery.

No stay or preliminary reference to the Board was, in any event, appropriate. The Board does not have primary responsibility for determining whether anticompetitive practices have been committed which affected aircraft supply and financing, nor is the performance of a preliminary fact-finding function by the Board necessary to preserve any coherent or uniform regulatory scheme. Indeed, a preliminary reference to the Board would be useless since no jurisdiction at all exists to conduct a proceeding under Section 411, and in a proceeding under Section 408 the Board's concern would necessarily be whether Toolco should be permitted to acquire or maintain control over TWA *in futuro*, rather than the adjudication of issues relating to past violations of the antitrust laws.

II.

A. The Board's orders approving Toolco's acquisition, first of 45% of the stock of TWA and then of approximately 78% of the stock of TWA, exempted from the

antitrust laws only the acquisition of control itself; they did not exempt the pattern of conspiratorial and unlawful conduct alleged in the complaint.

In its 1950 order the Board described its earlier control order as not granting "a blanket, unlimited *in futuro* approval of the relationship between Toolco and TWA • • •." The 1950 order was similar and had a comparable effect.

The last of the control orders was issued in 1950, before the bulk of the anticompetitive conduct alleged in the complaint took place, and certainly before the bulk of the adverse economic impact which that conduct had on TWA. Even in the investigation which resulted in the 1950 order, the Board and its Examiner, far from finding that Toolco's control had been good for TWA, found that the policies of Hughes and Toolco, in insisting on debt rather than equity as a means of meeting TWA's capital requirements, "must be condemned." The Board certainly never considered or approved in its orders prior to and including the 1950 order a course of conduct remotely resembling that alleged in this complaint.

More fundamentally, however, the Board is authorized by Sections 408 and 414 of the Federal Aviation Act to exempt from the antitrust laws only an acquisition of control. As Toolco's counsel wrote, in a letter to the Hearing Examiner in the original control case, "• • • the approval sought by Hughes Tool Company in this case would not constitute a license to permit Hughes Tool Company or TWA to do whatever they desire in the futur• • •" (R. 610). In their brief, petitioners consistently confuse approval of an acquisition of control with the approval of any and every use to which that control is put. As the Court of Appeals held, however, "surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling

party" (R. 1422). There is a pertinent analogy in *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), where this Court held that the mere fact that the New York Stock Exchange had a general power to adopt rules governing its members' relations with non-members did not compel the conclusion that "particular applications of such rules are therefore outside the purview of the antitrust laws" (373 U. S. at 357). Nothing in the Board's order approving Toolco's acquisition of control of TWA "authorized, approved, or required" Toolco to engage in a conspiracy involving the appropriation of a captive market, the boycotting of competitive suppliers of aircraft, the use of tying and exclusive dealing agreements to foreclose the TWA market, or the monopolization of the supplying of aircraft. This course of conduct was therefore not approved by the Board's orders and was not exempted by those orders from antitrust prosecution.

B. No action taken by the Board since 1950 has broadened the scope of the exemption theretofore created. The only matters submitted to the Board after 1950 were discrete transactions involving either the sale or lease of particular aircraft by Toolco to TWA or particular financing arrangements for TWA. The applications to the Board with respect to these transactions were brief and informed the Board only of their salient features. Many pieces of the pattern of dealing between Toolco and TWA were never submitted to the Board, and the Board was plainly not aware of them. The Board, for example, was certainly never informed of the coercive action by Hughes and Toolco whereby TWA was prevented from even negotiating with competitive suppliers of aircraft and whereby such competitive suppliers were foreclosed from the TWA market, or of Hughes' and Toolco's course of dealings with other air carriers and with aircraft manufacturers. Nor did it ever at any time or in any

way purport to exempt such activities from antitrust prosecution.

Contrary to the suggestion made in petitioners' brief that the Board followed a practice of "approving" the transactions submitted to it, what the Board in fact did with respect to these transactions was merely to amend its original control order so that the order would not "restrict or affect the right" of Toolco or TWA to carry out the transaction or so as to "permit" the transaction to take place. Indeed, the Board generally followed the practice of including in each of the amendatory orders a provision that it "shall not be deemed a determination for rate making purposes of the reasonableness of any of the transactions specified therein * * *", thus disassociating itself from any approval of the terms presented; the word "approve" is carefully restricted (with obvious intention) to acquisitions of control. The entire series of orders is summarized in Annex A, and the pattern which emerges flatly contradicts the interpretation which petitioners seek to impose. Nor are petitioners helped by their reference to an allegedly "extensive mass" of information contained in the Board's files as a result of various reporting requirements and rate making and other proceedings conducted. The content of these materials, which are *dehors* the present record, is unidentified, and so far as anyone can tell they had nothing whatever to do with any of the allegations of unlawful conduct contained in the complaint.

Neither TWA nor the Courts below deny the Board's power to condition its orders approving acquisitions of control. The existence of such authority does not mean, however, that the Board can use it to extend beyond the limits prescribed by Congress the scope of whatever antitrust exemption results from its orders. The Board may not, by use of the power to condition its orders, exempt from antitrust prosecution activities restraining trade in the supplying of aircraft and financing to air

carriers, markets which the Board is not authorized to regulate at all, much less to regulate exclusively.

C. It is neither necessary nor appropriate to refer this matter to the Board to determine the scope of the exemption created by its orders. The Board's business is not the issuance of antitrust exemptions, but the approval or disapproval of transactions which it is authorized to regulate. The antitrust exemption is an incidental statutory result of the Board's lawful order approving certain specified transactions; the exemption flows from the statute and not from the Board's voluntary grant. It is within the competence of a court, and indeed, it is the obligation of the court, to determine its scope.

III.

It would be an extraordinary result indeed to hold that, in the posture in which this litigation is presented, the complaint fails sufficiently to state a claim invoking the jurisdiction of the district court. Few, if any, of the many cases in which the sufficiency of an antitrust complaint has been challenged before this Court—and sustained—have contained as detailed and precise allegations of classic violations of the antitrust laws. As a matter of simple justice, plaintiff should not be summarily barred from the only tribunal provided by Congress for the redress of such injuries—without even an opportunity to prove its case.

Petitioners denigrate the complaint, apparently in the hope that their characterizations will be accepted without reading it; typical is their entirely baseless claim that the sole commerce involved is the supply of aircraft to TWA. That alone would be enough, but petitioners simply ignore paragraph 7, which describes the commerce involved as a whole, and pretend that paragraph 8, which concentrates on that part of the commerce particularly

affecting TWA, stands alone. Paragraph 7 specifically defines, among the relevant markets, the supplying of aircraft to TWA "and other air carriers." Similarly they pretend that the joint action required for a violation of Section 1 of the Sherman Act is not sufficiently alleged, as if Atlas Corporation were not clearly characterized as an important co-conspirator, and as if Hughes—one of the world's wealthiest and most powerful men—could possibly be excused from the conspiracy as a mere agent of Toolco, instead of being (as the complaint clearly states) the principal architect of the conspiracy, and its dominant figure throughout.

An actual examination of the complaint shows allegations plainly sufficient to charge an unlawful conspiracy to appropriate a captive market, an unlawful conspiracy to boycott, and an unlawful tying arrangement, all classically considered violations of Section 1 of the Sherman Act. Defendants' suggestion that a person coerced to boycott another cannot recover for the injury which he himself suffers (Petitioners' Brief, p. 98) is directly contradicted not only by *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), which recognized that the controlled cab companies involved there were harmed by being foreclosed from access to other cab manufacturers, but also by this Court's very recent decision in *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964). A violation of Section 3 of the Clayton Act through unlawful exclusive dealing arrangements is expressly and factually alleged, as are violations of Section 2 of the Sherman Act by monopolization and by attempts and conspiracy to monopolize various specialized markets which are described in detail.

In suggesting that they be excused for some or all of these antitrust violations because Toolco's acquisition of control over TWA was itself immunized by the Board from prosecution under the antitrust laws, including Section 7 of the Clayton Act, petitioners merely restate,

without improving, their earlier argument as to the expansive scope of the Board's power to exempt. Perhaps the acquisition would have been held violative of Section 7 if it had not been immunized; that question has never been submitted to a court. The present complaint, however, charges, not just the acquisition, but a comprehensive and long-continued course of unlawful conduct in which the control over TWA was used as a tool. It is absurd to suggest that every use which petitioners made of that tool was implicit in the acquisition itself. Toolco did not have to bar TWA from approaching and dealing with other suppliers of aircraft. It did not have to insist on unsound financing arrangements for TWA in order to cement its hold on the TWA market. It did not have to threaten Boeing in an effort to keep Boeing from dealing with TWA. Even if all of these activities had, in some sense, been implicit in the acquisition, it would have made no difference since the Board's power to exempt was, in any event, limited to the acquisition itself and did not extend to these other activities.

Nor can defendants avoid responsibility for their unlawful conduct on the ground that Toolco was not a manufacturer of the aircraft it supplied. (Indeed, the extent of Toolco's participation in the manufacturing arrangements remains unclear as a result of Toolco's success in truncating the discovery, see pp. 24-28, *supra*.) Suppliers of commodities have frequently been held guilty of restraining trade in a commodity even where they did not manufacture it themselves. *E.g., Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949). Petitioners' concession in an earlier brief that if they had been manufacturers they would be guilty (see pp. 131-32, *infra*), logically leads to the conclusion that they are guilty as suppliers.

Petitioners cap their exercise in record distortion by characterizing as a claim of "corporate mismanagement" (see p. 141, *infra*) TWA's common law claim, which is

based entirely on conduct since the time when Toolco ceased to have the power to control or manage TWA. The common law claim is, in fact, based on allegations of malicious interference with advantageous contractual and other business arrangements and it is both sufficient and plainly pendent to TWA's second antitrust claim, relating to that same conduct and that same period of time.

In sum, the complaint is sufficient, the exemption is inapplicable, and, since the Federal Aviation Act does not broadly exclude the federal courts from dealing with restraints of trade affecting the supplying of financing and aircraft to air carriers, the default order must be affirmed.

ARGUMENT

I. The Civil Aeronautics Board does not have exclusive primary jurisdiction of the conduct alleged in the Complaint.

Petitioners' first gambit in their effort to frustrate judicial vindication of TWA's rights is their argument that the Federal Aviation Act gives the Board powers in this area which are so pervasive as to supersede any antitrust remedy whatever. This argument is grounded on repeated references to the Board's "plenary powers over the relationship between a party 'engaged in a phase of aeronautics' and an air carrier which it controlled" (Petitioners' Brief, p. 35), to the Board's "broad panoply of powers over the control relationship between a party engaged in a phase of aeronautics and an air carrier" (*ibid.*), and to the Board's "continuing supervisory review, under the standards of the Act, over the exercise of the control relationship" (Petitioners' Brief, p. 36). These phrases are, however, the petitioners' own and they find support neither in the statute, nor in the legislative

history of the statute, nor in this Court's previous analysis of the relationship between the Board and the courts.

In considering this question, it is important to bear in mind that the issue posed here is not what the Board can do and what matters it can regulate, but, rather, what the Board can do *exclusively*. Three situations may exist with respect to the relationship between an administrative agency and the courts. As to some matters, the court may have exclusive jurisdiction, with the agency being barred from any interference or intervention. As to some other matters, the agency may have the exclusive responsibility, with no role being reserved for the courts, except on review of agency action. As to another category of matters, however, it may be possible for the agency and the court each to play its own role, with the agency having some functions to perform, and the court having others. Only if petitioners can succeed in demonstrating that the Board's jurisdiction over the conduct alleged in the complaint is exclusive, with the courts entirely displaced, can they prevail in their argument.

It is also important to bear in mind in considering the issue that none of the antitrust practices alleged in the complaint are practices whose impact was or is on the competitive situation in the field of air transportation. Rather, the areas of commerce described in the complaint and alleged to have been adversely affected by defendants' conduct are areas of commerce relating to the furnishing of aircraft, and particularly of jet aircraft, to air carriers including TWA and the furnishing of financing to TWA. We will demonstrate that neither the Federal Aviation Act, nor its legislative history, nor this Court's prior rulings support the conclusion that the authority given to the Board by Congress is so comprehensive and pervasive as to preclude judicial remedies against conduct of the kind alleged in the complaint, restraining such trade and commerce.

The Statutory Provisions

The thrust of the Federal Aviation Act is toward the regulation and control of *air transportation*. The only provisions which refer to persons engaged in "any other phase of aeronautics", like the defendants here, are Section 408, 49 U.S.C. §1378, relating to acquisitions of control, and Section 409, 49 U.S.C. §1379, relating to interlocking relationships.* If defendants are to deduce a Board power to regulate the activities of such persons so comprehensive as to exclude the courts, they must deduce if from these provisions.

Even Section 102 of the Act, 49 U. S. C. §1302, outlining the factors to be considered by the Board in determining the requirements of the public interest, refers to no factor which has any relation to the activities of persons engaging in the manufacture or supply of aircraft or any phase of aeronautics other than air transportation itself. Thus, the factors set out in Section 102 include only such considerations as the "encouragement and development of *an air-transportation system*," the "regulation of *air transportation* in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, *such transportation*," "the promotion of adequate, economical, and efficient *service by air carriers* at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices," "competition to the extent necessary to assure the sound development of an *air-transportation system* * * *", "the

* Section 407(c), 49 U.S.C. §1377(c), relating to certain reporting requirements for air carriers, contains the phrase "person engaged in any other phase of aeronautics," but only to require officers and directors of air carriers to file reports as to their holdings in such entities. There is no converse provision requiring the filing of such reports by persons engaged in a phase of aeronautics, or by their officers or directors. Similarly, under Section 409 the specified interlocking relationships are unlawful (absent approval) for an air carrier and its officers and directors, but *not* for a person engaged in another phase of aeronautics.

promotion of safety *in air commerce*", and "the promotion and encouragement" of *"civil aeronautics"* (emphasis supplied).

So far as any explicit supersession of the antitrust laws is concerned, the only relevant provision is Section 414 of the Federal Aviation Act, 49 U.S.C. §1384. The significant aspect of that provision is the narrowness and explicitness of the supersession provided for. Section 414 provides that:

> "Any person affected by any order made under Sections 1378 [408], 1379 [409], or 1382 [412] of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws', * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Thus, the only relief which Congress directed from the operations of the antitrust laws was such relief as was "necessary" to enable a person to do "anything authorized, approved, or required" by an order under Section 408, Section 409, or Section 412. Neither Section 409, relating to interlocking officers and directors, nor Section 412, 49 U.S.C. §1382, relating to agreements between air carriers, has any relation to our present problem. For present purposes, then, Congress's mandated supersession extends only "insofar as may be necessary to enable" a person to do something authorized, approved or required by an order under Section 408.

The only conduct, however, which the Board was authorized by Congress to approve under Section 408 was a consolidation or merger, an acquisition of control, or certain other transactions likely to have the same effect. Section 408, in essence, makes it unlawful, unless approved by the Board to effect an acquisition of control, and authorizes the Board under certain circumstances to

approve acquisitions of control and under other circumstances to disapprove such acquisitions. In defining the kind of order the Board shall issue after its hearing on an application for approval under Section 408, the statute specifies that the Board "shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *." The order approving the acquisition, with or without terms and conditions and with or without modifications, is the only order which the Board is qualified to enter under this section and is, therefore, the only order which results in the antitrust exemption referred to in Section 414.

The additional provisions of Section 408(d) and (e) are merely incidental to the task of approving or disapproving an acquisition of control, and they provide for no sanctions other than the Board's power to refuse approval of such acquisition. Section 408(d) confirms the Board's information-gathering power, so far as is necessary for the performance of its function under Section 408(b), and Section 408(e) confirms the Board's investigatory power insofar as it is appropriate to the performance of the Board's function under Section 408(b). These provisions do not alter the fundamental fact that the only function entrusted to the Board under Section 408 is to authorize or veto the creation, or maintenance, of a control relationship.

There is nothing anywhere in Section 408, or in any other provision of the Federal Aviation Act, which charges the Board with the responsibility for what petitioners describe as a "continuing supervisory review and inquest over the anti-competitive aspects of the control relationship" (Petitioners' Brief, p. 48). If what petitioners mean by this is merely that the Board may keep itself informed as to the incidents of the control relation-

ship and may, in appropriate circumstances, withdraw its approval of the existence of the relationship, then neither respondent nor the Court of Appeals would disagree. As the Court of Appeals pointed out:

> "The Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable, and thereby retain a continuing jurisdiction over the activities of the controlling party. In the exercise of this supplementary power the Board may investigate and regulate certain aspects of transactions effected between an air carrier and the controlling party. But the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed the regulation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB. The issue here is not whether the CAB may consider such matters but rather whether the federal courts have been excluded from their consideration by Congress." (R. 1423) (Footnote omitted.)

Petitioners seek to bolster their argument for a superseding Board jurisdiction by referring to Section 411 of the Act, 49 U.S.C. §1381, which authorizes the Board to investigate "unfair or deceptive practices or unfair methods of competition in air transportation and issue orders to cease and desist from such practices."

We note, at the outset, that since Section 411 is not one of the sections referred to in Section 414, the existence of a Board authority under this provision would not exclude judicial action. Section 411 cannot, however, aid petitioners' argument, in any event, since on any reasonable interpretation of the language and structure of the Federal Aviation Act, Section 411 has no possible application to the practices of the defendants in this case. Section 411 applies only to practices engaged in by an

"air carrier, a foreign air carrier or a ticket agent" and applies only to unfair or deceptive practices or unfair methods of competition "in air transportation or the sale thereof."

Relying on a footnote in this Court's decision in the *Panagra* case (371 U. S. at 310, n. 14), petitioners seek to suggest that Toolco might be regarded as an air carrier within the meaning of Section 411 by virtue of its interest in TWA. In that footnote, however, the Court merely indicated that it did not intend that question to be foreclosed by its opinion. In his dissenting opinion, Mr. Justice Brennan pointed out that "the Act in general does not purport to regulate stockholders of its subject carriers, and where it does, notably in Section 408, it does so explicitly" (371 U. S. at 329).

An analysis of the statute makes it perfectly clear that it cannot rationally be construed to make a person subject to the sanctions of Section 411 merely because he exercises control over an air carrier. Section 408(a)(2), for example, specifically refers to both "air carrier" and "person controlling an air carrier" in defining the persons to whom it is applicable. This seems a clear enough indication that the latter is not included within the former. Similarly, Section 407(c) refers separately to air carriers and to persons whose principal business is holding the control of air carriers in such a way as to indicate that the latter are not "air carriers". It would require an extraordinary juggling of the statutory language to give the phrase "air carrier" widely different meanings in these related statutory provisions. There is a single definition of "air carrier" in the statute, which is presumably applicable to the use of that phrase wherever it is used in any section of the statute.

Even if a person controlling an air carrier could somehow be regarded as an air carrier, however, this would not overcome Section 411's fundamental limitation to

practices "in air transportation or the sale thereof." There is no way of regarding the alleged restraint of competition in the supplying of aircraft and financing as being "in air transportation or the sale thereof."

Even if Section 411 could be construed to apply not only to an air carrier but to a person controlling an air carrier and to practices outside of air transportation, it would still not be broad enough to reach all of the conduct alleged in the complaint in this case. In its 1960 order, the Civil Aeronautics Board recognized that there had been such a change in the relationship between Toolco and TWA that a new application under Section 408 would be necessary prior to any attempt by Toolco "to reassume control over TWA" (A-224). While the Board in its recent action declaring that Toolco might exercise its option to acquire certain TWA notes inexplicably reversed itself and indicated that there had been merely a "temporary hiatus", so that no new approval was necessary, the Court of Appeals has held that Toolco is attempting to reassume control and that a hearing is required. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, 339 F.2d 56, 62 (2d Cir. 1964). Since Toolco surrendered its control of TWA in 1960 and has not to this date reassumed it, there has been no jurisdiction in the Board since December of 1960 to proceed against Toolco under Section 411 on any possible theory and thus, insofar as TWA seeks a remedy for unlawful conduct continued during this period, no Board remedy is available.

Indeed, as to the period since December 1960 the Board has no jurisdiction whatever. The Board itself has recognized that in order for jurisdiction under Section 408 to exist there must be an acquisition of control by one of the categories of persons referred to in Section 408.* Since December 1960 there has been no acquisition or

* *Transcontinental & Western Air., Inc., Control by Hughes Tool Company*, 6 C.A.B. 153, 155-56 (1944).

exercise or maintenance of control by Toolco over TWA* and, therefore, no jurisdiction in the Board to act under that section. Since neither Section 408 nor Section 411 provides a basis for Board action, conduct of Toolco since that date is entirely beyond the Board's reach.

Nor is the situation altered by the fact that the Board may now be called upon to conduct a hearing in connection with Toolco's application to acquire TWA notes which carry with them the power to control TWA, in which hearing Toolco's past unlawful conduct will be relevant. The only issue on that hearing will be whether it is in the public interest to permit Toolco to reassume control of TWA. No issue will be presented as to whether affirmative sanctions should be taken against Toolco with respect to its prior practices, and indeed, no authority for the imposition of such sanctions exists.

This review of the statutory provisions makes it evident that the Board's power is limited to approving or vetoing an acquisition of control, that the Board has no authority to impose sanctions against these defendants with respect to their past violations of the antitrust laws, and that the Board certainly does not have an exclusive right or obligation to deal with such practices.

The Legislative History

Petitioners urge that the legislative history of Section 408 "confirms that Congress intended to give the Board broad powers to deal with the anti-competitive problems inherent in the control of an air carrier by a person engaged in a phase of aeronautics" (Petitioners' Brief, p. 53) and seek to support that argument by selective quotations from the legislative history. A consideration of the full legislative history, however, indicates the fact to be quite the opposite.

* Perhaps the best evidence that Toolco has not controlled TWA since 1960 is the commencement and continued vigorous prosecution of this suit.

The legislative history makes plain that the only power Congress believed it was giving the Board was the power to permit or to veto acquisitions of control, that Congress was wary lest the Board be given a discretion which would enable it to impair the effectiveness of the antitrust laws, and that Congress never contemplated, and would have instantly rejected, any suggestion that the Board be given the power broadly to regulate the operation or use of a control relationship, particularly if such regulation insulated, to any degree, the operation or use of that control relationship from the antitrust laws.

As petitioners' brief points out, the antecedent of Section 408 was Section 7 of the Air Mail Act of 1934, 48 Stat. 936, which absolutely prohibited any ownership of an air carrier by a holding company or by a person engaged in another phase of aeronautics.

The Federal Aviation Commission, in the report which formed the basis for the legislation ultimately enacted as the Civil Aeronautics Act, recommended that there be substituted for this absolute prohibition a provision authorizing acquisitions of control by permission of the commission to be created, which became the Civil Aeronautics Board. Some of the reasons for this recommendation were stated as follows:

> "• • • it seems to us undesirable that air lines should be cut off from any large store of investment capital or of credit where there is no reason to anticipate great compensating benefit from such a severance. In particular we see no advantage, but rather the reverse, in prohibiting the participation of investment trusts in the financing of air-transport companies. Many of these trusts exist as legitimate enterprises for the diversification of investment risks. Some of them are devoted exclusively to investments connected with aviation, and their capital was originally received upon that understanding. To prohibit the holding of any airline stock by such companies seems to us not only a

> harsh restriction on their activities, but a very definite and perhaps a dangerous restriction on the accessibility to the air lines of large stores of 'well-informed capital', not subject to panicky disturbance by transitory influences." *Federal Aviation Commission Report,* Senate Doc. 15, 74th Cong. 1st Sess., p. 70.

It is evident that what the Federal Aviation Commission contemplated was authority in the Board to permit or to veto an acquisition of control, not a broad-gauge authority to administer or regulate control relationships. The Commission summed up its point of view as follows:

> "In this, as in some other matters, we recommend that commission powers be those of veto rather than of initiation." (*Ibid.*)

A reading of the Commission's report makes clear that it was recommending as a substitute for a flat prohibition of acquisitions of control the selective permission of such acquisitions, with the Board's sole function being to determine which should be permitted and which disallowed.

From this recommendation resulted the provisions of Section 408—provisions which, in essence, confide to the Board the simple choice between approving or vetoing any proposed acquisition of control. In the Congressional debate with respect to Section 408, only a part of which is quoted in petitioners' brief, two dominant themes emerge: first, the view, shared by all of those participating in the debate, that every precaution should be taken to insure full enforcement of the antitrust laws and minimum incursion into that area by the Board, and, second, the view that the only power being given to the Board in this provision was a power to permit or veto particular consolidations or acquisitions of control.

Senator McKellar repeatedly stated his view:

> "I desire to state that I cannot vote for any bill which proposes that a commission shall give air

> companies the right to combine and confederate into a hugh [sic] monopoly" (83 Cong. Record at 6729),

and

> "The Attorney General is authorized and directed to prosecute any violation of the antitrust laws. If we establish a commission, and give the commission the right to allow the companies to combine and confederate and become a great monopoly, we shall not only have injured our country but we shall have injured the industry itself to a degree which, in my judgment, cannot be imagined." (*Ibid.*)

The Senators were in accord that great care should be taken to insure that the impact of the antitrust laws not be impaired. Thus, Senator McCarran commented:

> "• • • every precaution has been written into the bill so that the antitrust laws and all laws for the prevention of combinations and monopolies shall be enforced. Such protection has been written into the bill from the standpoint of judicial law as the law has been construed by our courts; it has also been written into the bill from the standpoint of statutory law as the law has been construed by Congress so as to protect, as far as possible, against combinations and monopolies and yet yield a flexibility of progress. Protection has been written into the bill against combinations and monopolies in restraint of trade, in restraint of commerce, and in restraint of everything which would constitute a monopoly." (*Ibid.*)

And again, Senator McCarran went on to say:

> "To the Senator from Tennessee [Mr. McKellar], who sets up a straw man when he suggests that we are trying to destroy the antitrust laws, let me say that he is not a more ardent advocate of the antitrust laws than am I. I am one of those, as is the Senator from Missouri, who are determined to fight for the enforcement of the antitrust laws. We would go, perhaps, or, at any rate, I

would go, perhaps, much further than does the present administration of the Government to enforce the antitrust laws, for the present administration has seen fit in times past to forget the antitrust laws. But I will not go into that in detail." (83 Cong. Record at 6730)

Senator Borah objected that the statute, as then drawn, might give the commission too much leeway to approve an acquisition of control which might have an adverse effect on competition:

"First, let me say I have no doubt of the intent of the framers of this proposed legislation to inhibit or prohibit monopoly; but the language which is used on page 67, in the hands of a commission or of a court which desired to deal with the question with some degree of liberality, in my opinion, would permit practices which would be undesirable. The provision reads:

"'*Provided,* That no consolidation, merger, purchase, lease, operating contract, or acquisition of control shall be approved if such approval would result in creating a monopoly or monopolies and thereby unduly restrain competition or unreasonably jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control.'

"In other words, the use of the words 'unduly' and 'unreasonably' accentuates the doctrine laid down in the Standard Oil case. With all respect for that tribunal I do not wish to connive at a still more liberal construction." (*Ibid.*)

Senator Copeland expressed his willingness to accept Senator Borah's proposed amendment:

"I wish to say to the Senator from Idaho that, so far as I am concerned, I will be perfectly satisfied to have the two words 'unduly' and 'unreasonably' stricken from the bill, because it was the purpose

certainly of the Commerce Committee, and I have no doubt of the Interstate Commerce Committee, so to write this bill as that there should be no monopoly." (*Ibid.*)

Senator McCarran objected to the striking of the words "unduly" and "unreasonably" because he felt that the elimination of those words might unduly restrict the commission in permitting an acquisition of control or consolidation which the public interest might require:

> "We have got to do one of two things. No phase of this proposed legislation has been more studiously considered than that which would bring it *within the scope of the antitrust laws as they have been carried out.* But we have to consider that the quasi-judicial authority which we propose to set up shall have an opportunity and the ability within the law to cope with a situation which if it did not have such ability and opportunity might destroy property and destroy public service." (*Ibid.*) (Emphasis supplied.)

Senator McCarran went on to cite as an example a situation in which an airline might go out of existence unless taken over by another line and operated by it. Senator Borah responded:

> "Suppose an air line is going out of business, as the Senator suggests, and it is necessary to have it taken over by another line. Why do more than give the second line the authority to do so in case it will not restrain competition? If it does restrain competition, in my judgment it ought not to be done, and I think the Senator will agree with me. I know the Senator believes in the doctrine that monopolies should not prevail, and that competition should prevail. If that is true, why not say in the language of the bill that a consolidation shall not restrain competition? When we say that it shall not unduly restrain competition, we give to the judicial power or to the quasi-judicial power the

judgment to say whether, in its opinion, competition is unduly restrained. We are permitting them to restrain competition, but not unduly to restrain competition. In my opinion, that is a power which ought not to be granted; and I hope the time will come when the antitrust laws will be so strengthened that the unfortunate decision in regard to unreasonable restraint of trade will be set aside." (83 Cong. Record at 6731)

Again, Senator McCarran emphasized the desirability, in his view, of giving the commission sufficient flexibility in approving desirable consolidations:

> "Now let us consider the subject sanely and soberly. There is just one thing which the author of this bill wants, and that is any language—and I have tried studiously and zealously to select the language from the decisions of the Supreme Court, from the rulings made by commissions, from my experience, and from my training in the law—which will do two things: First of all, comply with the antitrust laws of the country so as to provide the greatest protection for competition. Secondly, give a high degree of flexibility to human judgment when I select an agency to exercise human judgment." (*Ibid.*)

The dispute was finally resolved as follows:

> "Mr. Borah: • • • We had the same thing come up when we had the N. R. A. We were going to revive and rehabilitate the earth by giving people discretion to do away with the antitrust laws whenever they thought in their judgment they should do so. We went through that experience. I myself do not want to be a party to writing into the law that which I think will aid in the destruction of competition.
>
> "Mr. McCarran: Mr. President, I will settle the question in a moment. I have such profound respect for the Senator from Idaho, and his knowl-

edge of constitutional law, and his everlasting devotion to the antitrust laws, that I am going to accept any amendment he will offer along this line which will aid me in carrying through this legislation.

"Mr. Borah: I believe that if the Senator will strike out the words 'unduly' and 'unreasonably' he can still do what the Senator from Missouri has suggested ought to have been done in one case, and what the Senator himself has suggested should be done in other cases. There would still be sufficient flexibility.

"Mr. Truman: I have no objection to that.

"Mr. McKellar: Mr. President, will the Senator yield?

"Mr. Truman: I yield to the Senator from Tennessee.

"Mr. McKellar: I have been called out of the Chamber for a moment. Before going, I just wish to say that I think the bill has been vastly improved by the suggestion of the Senator from Idaho that in line 21, page 67, the word 'unduly' and in line 22 the word 'unreasonably,' be stricken from the bill, and I am very happy that the authors of the bill are willing to strike out those words. I think striking them out will improve the bill tremendously." (83 Cong. Record at 6732)

The discussion concluded with some further explanation of the effect of removing the words "unduly" and "unreasonably":

"Mr. Pope: Mr. President, I should like to ask, what would be the effect of striking out the words 'unduly' and 'unreasonably' on page 67? In other words, why were those words inserted in the first place? Was there a reason for inserting them; and if so, what would be the effect of striking them out?

"Mr. McCarran: Mr. President, in my judgment, if the Senator addresses his question to me, the

effect would be that it would lessen what I choose to term the flexibility of judgment. In other words, we are creating an authority to deal with a great industry. We are giving to that authority very much power and latitude, so that the industry may go forward and the public may be served.

"If we provide that they shall not do a thing 'unduly' or 'unreasonably', we inject into the law the equation of human judgment as to what is undue and what is unreasonable. If we take those words out, then we say that they shall not do a certain thing. That is an analysis of it, as I see it."

* * * * *

"Mr. Borah: Mr. President, the suggestion of my colleague that a merger necessarily destroys competition, in my judgment, is not well sustained. There may be a merger or there may be a combination, and it may not have any effect on the question of competition whatever. It all depends upon the facts in each case. What I desire to see accomplished is the preservation of the opportunity of competition. When we say to the commission that these lines shall not do a thing 'unduly' or 'unreasonably', it is very different from saying that they shall not do it. It gives too much room for unlimited construction." (*Ibid.*)

It is evident from this colloquy, in the first place, that none of the Senators involved in the debate conceived that the Board would arrogate to itself any function in this area beyond the approving or vetoing of proposed consolidations or acquisitions of control. The protective proviso on which the discussion centered provided only that no consolidation, acquisition of control, or the like "shall be approved if such approval would result in" the proscribed anti-competitive effects. If it had been thought that the Board could not only approve acquisitions of control, but also engage in comprehensive regulation of the relationship between the acquiring person and the acquired company

and thereby exclude the application of ordinary antitrust principles, then a broader proviso would undoubtedly have been included. The Senators could certainly not have intended that the commission be precluded from approving an acquisition which would create a monopoly and restrain competition, but at the same time be authorized to regulate a control relationship in such a way as to allow a monopoly or restraint of competition to come into existence.*

In the second place, the comments of all the Senators involved in the debate evidence concern that antitrust principles be preserved in their application to both air transportation and the relationship between air carriers and those controlling them. Moreover, the prevailing view, which succeeded in having the words "unduly" and "unreasonably" stricken, was a view that desired to allow the Board very little discretion to permit behavior which could conceivably have an anti-competitive impact.

Indeed, there is particular significance in Senator McCarran's comment that protection against antitrust violation:

> "* * * has been written into the bill from the standpoint of judicial law as the law has been construed by our courts; it has also been written into

* The statement is made in petitioners' brief (p. 58, n. 13) that: "During the discussion of Senator Borah's proposal, it was the common assumption and understanding of all concerned that enforcement of the policy of the antitrust laws in situations arising out of acquisitions of control of an air carrier was confided to the Board under § 408 * * *. The question was as to the phrasing of the legislative standard to be confided to the Board for its administration." This statement completely misrepresents the thrust of the debate by inserting the phrase "in situations *arising out* of acquisitions of control." The only issue considered by the Senators related to permitting or vetoing acquisitions of control and the legislative standard they were devising was a standard to be applied in determining which acquisitions were to be permitted and which vetoed. All of their examples also related to attempted acquisitions, not to conduct of the acquiring party in his relations with the acquired party, much less a course of conduct involving, and affecting, third persons.

> the bill from the standpoint of statutory law as the law has been construed by Congress * * *." (83 Cong. Record at 6729)

This reference must have been to the saving clause in the Federal Aviation Act and provides a strong indication that this saving clause was to operate precisely in this area of control relationships to insure the continued protection of the antitrust law both statutory and judge-made.*

A final factor which militates strongly against a finding that Congress intended a broad supersession of the antitrust laws is the very paucity of the discussion of the impact of Section 414. One would suppose that, if Congress had really intended to supersede the antitrust laws in an area as broad as petitioners contend, there would have been a much more extensive and detailed consideration of that matter, including at the least *some* reference to applications in the field of aircraft manufacture and supply, particularly in the light of the strong views expressed by all who were active in the debate that antitrust enforcement ought not lightly to be impaired.

This Court's Prior Rulings

No principle is more firmly established in recent decisions of this Court than the principle that exemptions from the antitrust laws in particular regulatory statutes are to be narrowly construed and exclusion of antitrust policy from a particular area is not lightly to be presumed.

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* This provision is contained in Section 1106 of the Federal Aviation Act, 49 U.S.C. § 1506:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this law are in addition to such remedies."

This provision was relied on by the Court of Appeals in its opinion (R. 1424).

As early as 1945 this Court was saying in *Georgia* v. *Pennsylvania R.R.*, 324 U. S. 439, 456-57:

> "Regulated industries are not *per se* exempt from the Sherman Act * * *. It is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy."

In a succession of recent decisions this principle has been reiterated. For example, in *California* v. *Federal Power Commission*, 369 U. S. 482, 485 (1962):

> "Immunity from the antitrust laws is not lightly implied * * *. We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one."*

See also *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350-51 (1963); *Silver* v. *New York Stock*

* This Court's handling of the relationship between judicial and administrative action in *California* v. *FPC* is particularly instructive. There the Department of Justice attacked El Paso's acquisition of the *stock* of Pacific Northwest under Section 7 of the Clayton Act and the FPC approved El Paso's subsequent acquisition of the *assets* of Pacific Northwest while the antitrust suit was pending. Despite the fact that Section 7 of the Natural Gas Act gave the Commission power to approve such an acquisition of assets (although not an acquisition of stock), and despite the fact that Section 7 of the Clayton Act provides that it shall not apply to "transactions duly consummated pursuant to authority given by the * * * Federal Power Commission * * * under any statutory provision vesting such power in such Commission," this Court held, not only that the asset acquisition should not have been approved by the Commission, but that the Commission should have refrained from any action whatever during the pendency of the antitrust suit because any action it took might "carry momentum into the antitrust suit" (369 U. S. at 489). This Court pointed out that, "Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency" (369 U. S. at 490). This ruling underscores the need of delineating very carefully the precise scope of the agency's responsibility and the *minimum* intrusion into antitrust policy administered by the courts which is necessary to enable the agency to perform the functions entrusted to it by Congress.

Exchange, 373 U. S. 341, 357 (1963); *United States* v. *Borden Co.*, 308 U. S. 188, 206 (1939).

Indeed, this Court has held that, even where an administrative agency has considered a particular transaction and has approved that transaction after weighing a variety of public interest factors, including antitrust considerations, the approved transaction may still not be immune from antitrust attack.* In *United States* v. *Radio Corporation of America*, 358 U. S. 334 (1959), the FCC had approved an exchange of television stations between NBC and Westinghouse. It was stipulated and this Court assumed that the FCC had decided all antitrust issues that were before it (358 U. S. at 338). The Court recognized that the FCC's approval was based on the statutory standard of "public interest, convenience, and necessity", but emphasized that the Commission was authorized to consider "federal antitrust policy" and "might find that antitrust considerations alone would keep the statutory standard from being met" (358 U. S. at 351). This Court nevertheless held that the doctrine of primary jurisdiction did not apply and that the exchange was subject to attack in an antitrust suit brought by the Department of Justice.*

This Court's decision in the *Panagra* case deviates in no way from this line of authority. Indeed, this Court commenced its discussion of the problem posed by that case by observing that "we hesitate here, as in comparable situations, to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—absent an unequivocally declared congressional

* Compare the statement at pages 46-47 of petitioners' brief that the Board's power to deal with antitrust problems must be exclusive "because of the power vested in the Board—in which the courts in a judicial antitrust suit do not partake—to consider policy factors apart from the antitrust laws, in coming to an overall conclusion." In the *RCA* case the FCC took account both of antitrust considerations and of policy factors apart from the antitrust laws, but this Court nevertheless held that its power was not at all exclusive.

purpose so to do", citing *Georgia* v. *Pennsylvania R.R.*, *United States* v. *RCA*, *United States* v. *Borden Co.*, and *California* v. *FPC* (371 U. S. at 304-05). Petitioners themselves are compelled to concede that this Court did not hold that the antitrust laws are "totally superseded with respect to all transactions involving regulated air carriers" and that this Court made it clear that "the question of the extent to which the provisions of the Federal Aviation Act displace the antitrust laws, vesting an exclusive jurisdiction in the Board, depends on the particular details of the antitrust violations charged and the specifics of the Board's regulatory power" (Petitioners' Brief, p. 43).

In *Panagra* this Court summed up its approach to the reconciliation of the Federal Aviation Act with the antitrust laws as follows:

> "While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total. Apart from orders which give immunity from the antitrust laws by reason of §414, the whole criminal law enforcement problem remains unaffected by the Act. * * * Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined. We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce." (371 U. S. at 305)

After noting the relatively modest commitment of antitrust problems to the Board, this Court went on to state the basis of its ruling on the facts in that case as follows:

> "The acts charged in this civil suit as antitrust violations are *precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers.*

> The case is therefore quite unlike *Georgia* v. *Pennsylvania R. Co., supra*, where a conspiracy among carriers for the fixing of through and joint rates was held to constitute a cause of action under the antitrust laws, *in view of the fact that the Interstate Commerce Commission had no power to grant relief* against such combinations." (371 U. S. at 305-06) (Emphasis supplied.)

The Court took some pains to state its holding concisely:

> "It seems to us, therefore, that the Act leaves to the Board under §411 all questions of *injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers.* See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Keogh* v. *Chicago & N.W.R. Co.*, 260 U. S. 156." (371 U. S. at 310) (Emphasis supplied.)

By way of further indicating the necessity of such a ruling, this Court continued:

> "• • • the particular relation of this problem to the general process of encouraging development of ***new fields of air transportation*** makes it all the more appropriate that the Board should decide whether these particular transactions should be undone in whole or in part, or whether they should be allowed to continue." (371 U. S. at 311) (Emphasis supplied.)

The Court finally summed up:

> "We think *the narrow questions presented by this complaint* have been entrusted to the Board and that the complaint should have been dismissed." (371 U. S. at 313) (Emphasis supplied.)

It is submitted that a dismissal or delay of antitrust proceedings on grounds of primary or exclusive agency jurisdiction can be justified on only two grounds.

First, if Congress has clearly and unmistakably conferred on an administrative agency power to exempt from the antitrust laws all conduct alleged in a particular complaint, then the complaint must be dismissed. *E.g., Far East Conference* v. *United States*, 342 U. S. 570 (1952); *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U. S. 474 (1932). In such cases the action of the agency has primacy because Congress, in conferring power to exempt, has indicated that the agency's specialized policies and principles are to prevail. This justification for primary agency responsibility disappears, however, in areas where Congress has not clearly and expressly given the agency authority to supersede the regime of the antitrust laws, which remain applicable and which it is the primary responsibility of the courts to enforce.

The second situation in which the agency's primary or exclusive jurisdiction may be invoked is where the agency is charged with administering a regulatory scheme in which a prime requisite is a uniformity or coherence which sporadic judicial action would destroy or impair. Typical of this kind of case are the rulings in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), and *Keogh* v. *Chicago & N.W. Ry.*, 260 U. S. 156 (1922). In each of those cases a suit seeking damages for the charging of an unreasonable rate was dismissed because it was a principal purpose of the Interstate Commerce Act to secure uniformity and prevent discrimination in railroad rates and the Court felt that the entertaining of a multiplicity of suits challenging particular rates would impair the sought-after uniformity. Where the need for uniformity or coherence is the basis for deference to agency action, it may justify only a stay, rather than a dismissal, of the judicial proceedings. For example, in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84 (1962), the requirements of uniformity were held to be sufficiently

served by allowing the ICC to determine the reasonableness of a routing practice, with a subsequent determination by the court of the damages recoverable.

In our view the *Panagra* decision is a logical consequence of the *Abilene* and *Keogh* cases, and indeed, those are the cases which this Court cited in support of its ultimate ruling (371 U. S. at 310). The finding that the Department of Justice was precluded from pursuing its remedy in the *Panagra* case rested upon the Court's conclusion that, on those particular facts, the judicial remedies which the Department was pursuing would produce an undesirable disruption of the agency's regime. But that result flowed from a coincidence in that case of a number of significant factors:

> 1. The conflicting regimes were those of two governmental agencies, the Department of Justice and the Civil Aeronautics Board, each of which was seeking vindication of the public interest.
>
> 2. The Department of Justice was seeking only injunctive relief and the agency had at its disposal remedial measures just as broad and just as flexible as those available in court.
>
> 3. The issues presented by the complaint went to the problems of route structure and common carrier-air carrier interrelations which are problems at the heart of the *air transportation industry*, which the Board is charged to regulate.
>
> 4. The system of routes is one in which coherence and overall structure are important and as to which sporadic judicial action might be particularly mischievous.

None of these factors, which dictated the result in *Panagra*, is present here.

Turning first to the first two considerations listed, we find in this case not two governmental agencies equally equipped to secure relief, but rather a private

litigant whom the Board is powerless to help. The only remedy thus far granted by the District Court is an award of damages, which the Board plainly cannot give. Not only is the Board powerless to give this particular remedy, it is powerless to provide *any* remedy against the conduct of which the plaintiff complains. As has been shown (p. 79, *supra*), the Board can provide no remedy under Section 411 of the Federal Aviation Act since none of the defendants is an air carrier and their unlawful conduct is not conduct "in air transportation or the sale thereof". Even if Section 411 had some application, it could not now effectively be employed to deal with or correct a course of events which has, in large part, passed into history. And with respect to present events, as has also been pointed out, the Board has no jurisdiction to provide any relief whatever (p. 81, *supra*).

Turning to the next factor, it is evident that the matters alleged in the complaint relate, not to the air transportation industry, but to industries on the periphery of air transportation, industries which the Board has no duty or power to regulate. The areas of trade and commerce alleged to have been adversely affected by defendants' course of conduct are trade and commerce in the supplying of aircraft to TWA and other air carriers and the furnishing of financing to TWA (p. 7, *supra*). Because of this, the instant case is strikingly similar to *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa. 1943), where a three-judge court found that the defendant had violated the Sherman Act in its supplying of sleeping cars to the railroad industry. The Court found that it had jurisdiction to proceed despite the fact that both the defendant and the railroads which it supplied with sleeping cars were subject to regulation by the ICC:

> "In its relation with the traveling public, Pullman is subject to regulation by the Interstate Commerce Commission; its relations with its railroad cus-

> tomers are a matter of contract. And the business about which this suit centers is not that of furnishing sleeping cars to the public, but that of supplying such cars and the service incident to their operation to the railroads of the country. It is in this business that the government contends that the defendants have violated the Sherman Act." (50 F. Supp. at 127)

Similarly, the business about which this suit centers is not the furnishing of air transportation to the public, which is subject to regulation by the Board, but the furnishing of aircraft and financing to the airlines, which is not.*

Finally, there is no reason why a judicial solution to TWA's problem will interfere with any coherent system

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* The extensive Senate debate on the wording of the antimonopoly proviso of Section 408(b) of the Act (see pp. 82 *et seq.*, *supra*) demonstrates that Congress did not regard the Board as having been authorized to deal with or rule upon anticompetitive practices affecting any area of commerce other than air transportation itself (83 Cong. Rec. 6729-32, 75th Cong., 3d Sess. (1938)). The Board, in its initial interpretation of the Section 408(b) antimonopoly proviso, gave effect to this clear Congressional intent by ruling that "the word 'monopoly', as used in the first proviso of Section 408(b), refers to a particular degree of control *of air transportation or any phase thereof*, in any territory or section of the country" (emphasis supplied). *United Air Lines Transport Corp. and Western Air Express Corp.—Interchange of Equipment*, 1 C.A.A. 723, 734 (1940). Similarly, the language added by the Civil Aeronautics Act to Section 11(a) of the Clayton Act (15 U.S.C. §21(a)) and Section 5(a)(6) of the Federal Trade Commission Act (15 U.S.C. §45(a)(6)) is consistent only with a limited authority in the Board to deal with anticompetitive practices in the field of air transportation only. Thus, Section 1107(f) of the 1938 Act amended the Federal Trade Commission Act to provide that the Federal Trade Commission be empowered and directed to prevent persons, partnerships or corporations "except * * * *air carriers and foreign air carriers* subject to the Civil Aeronautics Act of 1938" (emphasis supplied) from using unfair methods of competition and unfair or deceptive acts or practices in commerce, and Section 1107(g) amended the Clayton Act to provide that authority to enforce that Act be vested in the Board "where applicable to *air carriers and foreign air carriers* subject to the Civil Aeronautics Act of 1938" (emphasis supplied). Plainly Congress did not intend that the Board have the responsibility to eliminate or adjudicate antitrust violations or anticompetitive practices in areas of commerce other than air transportation.

constructed by the Board. The only remedy ordered by the ruling now under review is the payment of money by defendants to TWA to compensate it for the harm done it and its independent stockholders by Toolco's monopolization of and restraints upon the supply of the jet planes and financing it needed. The granting of such relief neither impairs the exercise of any Board function nor interferes with any uniformly applied policy or coherent structure which the Board administers.*

In sum, the very analysis employed by this Court in the *Panagra* case compels the conclusion that the Board does not have exclusive authority to deal with the matters alleged in this complaint and that the District Court had ample jurisdiction to enter the order which it entered, and which the Court of Appeals affirmed.

No Preliminary Reference to the Board Was Appropriate, and Even If It Were, the Default Order Would Be Proper**

In their Petition for Certiorari petitioners conceded that the damages sought in TWA's complaint were a form of relief "not available in Board proceedings" (p. 16). This concession was of course necessary since it is perfectly plain that the Board has no power to award damages. Petitioners argued, however, in their Petition that the proper procedure in a case like this one is not to award damages until "after the Board has determined the issues presented by the complaint" (p. 17). Now petitioners apparently have moved their line of defense to higher

* Thus, in *United States* v. *RCA*, *supra*, this Court said:

> "* * * there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U. S. at 350)

** In this section we consider principally the matters raised by petitioners in their Point III at pp. 84-88 of their brief.

ground by arguing that, according to the *Panagra* case, "the substantive provisions of the antitrust law have been superseded" and there is no right to relief at all (Petitioners' Brief, p. 85).*

Petitioners' argument is not only wrong, as we have shown above in our discussion of the *Panagra* case, but frivolous, as is demonstrated by the decision in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84 (1962), cited approvingly in *Panagra*, where this Court held that, even though the Interstate Commerce Commission had primary jurisdiction over motor-carrier routing practices, once the Commission had found such a practice unreasonable, a court could award damages. This Court explained this result as follows:

> "* * * the survival of a judicial remedy under the saving clause of §216(j) [of the Interstate Commerce Act, 49 U.S.C. §316(j)] cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on the effect of the exercise of the remedy upon the statutory scheme of regulation. * * * Here, as we have

* Since the order under review awards only damages, and the District Court has not yet determined whether to direct divestiture, consideration of the availability of that relief is premature. We note, however, that this relief may not be available from the Board. Since 1960 Toolco has not had the power to vote its TWA stock. If the Board was correct in 1960 when it regarded the creation of the voting trust as terminating the pre-existing control relationship so that only an attempt to "reassume" control would call Section 408 into play, then the Board has not had jurisdiction since 1960 to direct divestiture of Toolco's stock. The proceeding now pending before the Board with respect to Toolco's reassumption of control relates only to the question whether Toolco can reacquire the voting rights, not whether it should dispose of its stock. TWA's demand for judicial divestiture rests not only on Toolco's misuse of the bare stock interest, without voting rights, as it has existed since 1960, but also on the power of the court to direct divestiture of a controlling stock interest, whether or not lawful when acquired, by reason of other related and encompassing violations of the antitrust laws. See also pp. 131-32, *infra*.

> indicated, rather than running interference against the Act the exercise of the judicial remedy supports its overall purposes and is nowise inconsistent with the congressional scheme embodied within its four corners." (371 U. S. at 89)

Thus, if conduct is found by the Board to be unsanctioned by, or in violation of, the Federal Aviation Act, no reason appears why a judicial remedy ought not to be granted, under the analogous saving clause, to compensate the injured party.

Petitioners' concession that the Board cannot award damages in fact requires affirmance of the judgment below. As we will demonstrate in Point II, whatever the Board has done, it has not exempted the conduct alleged in the complaint from antitrust prosecution. When petitioners concede that the Court can provide a remedy not available in Board proceedings, so that the most they were entitled to below was a stay of the treble-damage action until the Board had acted, they necessarily concede that the order entered by Judge Metzner could not be challenged for lack of jurisdiction. That order was an order granting a default judgment because of petitioners' failure to comply with perfectly proper discovery orders, not themselves open to challenge on any ground other than the existence of a jurisdictional defect. Moreover, the issues certified to the Court of Appeals were limited to jurisdictional issues. As is suggested above (pp. 2-3, *supra*), there is serious doubt that either the existence of agency primary jurisdiction or actual exemption could warrant setting aside the default order. Certainly, if petitioners' only right was to a stay, it must be conceded that such a right did not amount to a jurisdictional defect sufficient to vitiate the default order.

In point of fact, neither a stay nor a dismissal would have been appropriate. The procedure employed in the *Hewitt-Robins* case, *supra*, and referred to in the *Pan-*

agra opinion (371 U. S. at 313, n. 19), is appropriate only when the agency does have primary jurisdiction, but the court can provide a remedy not available through the agency. For all of the reasons we have indicated above, the Board does not have primary jurisdiction here. It does not have the primary responsibility for determining whether anticompetitive practices exist in the industries of aircraft supply and aircraft financing; it administers no overriding policy in that area; the performance of a preliminary fact-finding function as to such matters is unnecessary to the preservation of any coherent or uniform Board program comparable to that involved in the *Hewitt-Robins* case.*

The absurdity of the suggested stay procedure, as applied to this case, is evident. If TWA were relegated first to the Board, it could not ask the Board to proceed under Section 411, since that section is applicable neither to these defendants nor to activities of the kind charged against them (pp. 79-81, *supra*). Even if Section 411 were applicable, many of the practices complained of are now a matter of history and an application for a cease and desist order would no doubt be dismissed as moot. A proceeding under Section 408, such as the one which is now to be conducted with respect to the recently attempted resumption by Toolco of control over TWA, would be of no use for providing a factual foundation for TWA's treble damage claims. In such a proceeding the Board's concern is with whether acquisition or continuance of control in the future will be in the public interest; whatever the relevance of past misconduct, the Board is certainly not charged with adjudicating antitrust issues, as such, and,

* The preliminary reference to the Interstate Commerce Commission in *Hewitt-Robins* was necessary to preserve a uniformity of interpretation by the Commission with respect to motor-carrier routing practices. Here neither routing practices, nor rates, nor, indeed, even air transportation is involved.

as the example of the *Toolco-Northeast Control Case* (pp. 53-58, *supra*) indicates, other and different factors may take precedence in the Board's deliberations and findings.

A preliminary reference to the Board would be worse than useless; it would delay the judicial proceedings without enlightening them, and it would succeed only in permitting defendants, once again, to delay their day of reckoning.

II. The Board has not by any of its orders exempted from the antitrust laws the conduct alleged in the Complaint.

Petitioners next urge that either the original control orders, or the Board's subsequent orders with respect to particular transactions, or the two sets of orders taken together, have effected a complete insulation from the antitrust laws of the course of conduct alleged.

We consider first so much of petitioners' argument as is based on the original control orders.

The Original Control Orders Did Not Exempt Petitioners' Unlawful Conduct from Antitrust Prosecution

Petitioners suggest that the first control order "canvassed the anti-competitive effects which might be expected to flow" from the original acquisition of control (Petitioners' Brief, p. 64) and that the hearing on the further control case "ranged over the entire history of the Toolco-TWA relationship and the full spectrum of activities which that relationship encompassed" (Petitioners' Brief, p. 65). Petitioners also suggest that, in the latter case, the Board "reviewed in minute detail Toolco's stewardship of TWA" and "carefully scrutinized Toolco's policy of having TWA raise new capital primarily by debt rather than equity financing" (Petitioners' Brief, p. 66).

As we will develop more fully below, the controlling fact is that the Board's power under Section 408 of the Act does not include adjudications of antitrust violations. Its authority is limited to approval of acquisitions of control, and, whatever it considered or purported to consider in the control proceedings, the effect of the action which it ultimately took must necessarily have been limited to the function entrusted to it by the statute.

A few facts as to the control proceedings themselves are worth noting before proceeding further. First, and most obvious, is the fact that the last of these control proceedings resulted in a Board order issued in 1950, before the bulk of the conduct complained of by TWA had taken place, and certainly before most of the adverse economic impact on TWA for which redress is sought. Second, it is not without significance that at the time the first control case was initiated, Toolco already had a controlling interest in TWA, and TWA's president was employed in an advisory capacity by Toolco, circumstances which hardly facilitated the taking by TWA of a position adverse to Toolco in the investigation. By the time the second control investigation took place, Toolco had not only had practical control of TWA for a number of years by virtue of its 45% stock interest, but pursuant to the Letter Agreement of January 8, 1947, Toolco had already assumed even greater control over TWA. A brief show of management independence, indeed, had resulted in the replacement of enough of the directors to assure a firm majority of Toolco nominees, and the forced resignation of the president himself (A-244).

Moreover, contrary to petitioners' intimation that the Board had canvassed the Toolco-TWA relationship and liked what it saw, the report of the Examiner in the 1950 control case indicates that, with respect to the subject which he considered most thoroughly, *i.e.*, Toolco's policies with respect to TWA's financing arrangements, the

Examiner found that Toolco's policies had been wrong and had been detrimental to TWA. Thus, the Examiner found that "• • • the insistence of Mr. Hughes and Mr. Dietrich [of Toolco] on debt as a matter of deliberate policy to meet TWA's capital requirements right after the war ended must be condemned" (12 C.A.B. at 222), and while the Examiner gave Toolco good marks for having come to TWA's assistance in the "financial crisis of late 1946 and early 1947" (12 C.A.B. at 223), it seems apparent from the Examiner's decision that the crisis would not have occurred if Toolco's original policies had been otherwise.

It is also of interest that the Board's Public Counsel took the position in the *Further Control* case that the Toolco control of TWA between 1944 and 1947 had been detrimental to the interest of the carrier and the public interest, but that the Board did not have adequate power to deal with that situation and was, therefore, left with no alternative than to approve the additional acquisition of control (12 C.A.B. at 193). There is certainly no indication that either the Examiner or the Board was advised of, or took into account, any course of conduct remotely like that alleged in this complaint, or the likelihood or possibility that such a course of conduct might occur.

Petitioners begin to approach the heart of the question when, at page 67 of their brief, they argue that:

> "In approving Toolco's absolute control of TWA, the Board must have understood that Toolco would exercise that control."

Petitioners continue:

> "The concept of control incorporated into the regulatory framework makes sense only insofar as it means and necessarily implies the exercise of managerial and operational power by the controller over the business of the controlled party, such as Toolco has exercised over TWA." (*Ibid.*)

Petitioners here, as they persistently did in their briefs in the courts below, confuse the approval of an acquisition of control with the approval of every exercise of such control which is actually made. TWA, of course, agrees that the Board authorized Toolco to acquire and exercise control of TWA, and it may be fairly implied that one who acquires control will exercise it, just as a pistol permit authorizes the holder not only to buy, but to carry and use a pistol. The police grant of such authority, however, in no way authorizes specific uses in violation of other laws. If the complaint alleged only that Toolco, after acquiring its TWA stock, had voted it to elect a board of directors which selected TWA's management, TWA would concede that the conduct alleged obviously fell within the scope of the Board's exemption. The difference which Toolco ignores is the difference between approval of an exercise of control in general and approval of particular things done in the exercise of that control.*

* Petitioners' argument that approval of an acquisition of control necessarily carries with it approval of every particular exercise of that control is not helped by its citation of cases to establish what it calls a "consistent practice" by the Board not to approve interlocking relationships between equipment suppliers and air carriers, while approving such relationships where there has been approval of the acquisition of the carrier by the supplier (Petitioners' Brief, p. 68). If all that petitioners are trying to establish is the irrelevant proposition that when the Board authorizes an acquisition of control it envisions that the control will be exercised (Petitioners' Brief, p. 67), that much can be admitted. The Board's decisions, however, do not establish any "consistent practice" under Section 409 that interlocks are permitted only when an acquisition of control has been approved and can be assumed to convey a general approval of later exercise of the approved control. Indeed, the Board has approved interlocking relationships between air carriers and suppliers to air carriers whenever it finds "no substantial conflict of interest will arise." *Barry T. Leithead and Trans World Airlines, Inc.*, CAB Docket 12070, Order No. E-16310 (1961), (interlocking relationship between TWA and B. F. Goodrich Company). In neither that order nor any of the following orders approving interlocking relationships between air carriers and suppliers had there been any prior approval of an acquisition of control: *United Airlines, Inc. and William A. Patterson*, CAB Docket 7796, Order No. E-10644

Section 408(a)(5) of the Federal Aviation Act, under which the Board's control orders were issued, makes it unlawful without Board approval

> "• • • for any air carrier or person controlling an air carrier, any other common carrier or any person engaged in any other phase of aeronautics to acquire control of any air carrier in any manner whatsoever • • •".

Since the Board's only jurisdiction under this provision, for present purposes, is to approve an *acquisition of control* of an air carrier (TWA) by a person engaged in any other phase of aeronautics (Toolco), the exemption flowing from an order issued under this provision can extend only to the *acquisition*. It cannot extend to combinations and conspiracies entered into by the acquiring person; it cannot extend to threats or intimidations by the acquiring person; *it cannot even extend to contracts of sale* or similar agreements between the acquiring person and the acquired carrier. The Board's authority to approve agreements with resultant antitrust exemption is defined in Section 412 of the Act; that Section extends only to agreements between air carriers, foreign air carriers and ticket agents. Since Toolco is neither an air carrier, a foreign air carrier nor a ticket agent, agreements between

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(1956), (interlock with Goodyear Tire & Rubber Company); *United Air Lines, Inc. and William A. Patterson*, CAB Docket 7796, Order No. E-10732 (1956), (interlock with Westinghouse Electric Corporation); *Carter L. Burgess and Trans World Airlines, Inc.*, CAB Docket 8674, Order No. E-11375 (1957), (interlock with American Machine and Foundry Company); *Pacific Northern Airlines, Inc., Paul Porzelt and Rudolph Deetjen*, CAB Docket 9020, Order No. E-12009 (1957) (interlock with Avco Manufacturing Corporation); *Lake Central Airlines, Inc. and Edward McC. Blair*, CAB Docket 10149, Order No. E-13897 (1959), (interlock with General Dynamics Corporation); *Carter L. Burgess and American Airlines, Inc.*, CAB Docket 11052, Order No. E-14827 (1960) (interlock with American Machine and Foundry Company); *Malcolm A. MacIntyre and Eastern Air Lines, Inc.*, CAB Docket 11102, Order No. E-14943 (1960), (interlock with Avco Corporation).

it and TWA are not subject to exemption by Board approval.

This difference between authorizing, on the one hand, an acquisition of control, on the assumption that it will be exercised but without passing on the lawfulness or propriety of the actual exercise, and authorizing, on the other hand, a particular course of conduct or particular things done in the exercise of that control, was easily perceived by the courts below. Judge Metzner, for example, observed that:

> "These [control] orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of 'acquisition of control' not activities engaged in by the controlling party subsequent to acquisition, which may be illegal." (A-123)

Similarly, the Court of Appeals found that:

> "Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party." (R. 1422)

This Court has drawn similar distinctions in other cases. For example, in *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), this Court held that under the Securities Exchange Act the New York Stock Exchange had a general power to adopt rules governing its members' relations with non-members so that the mere adoption of such rules could not be said to be in violation of the antitrust laws. The Court held, however, that:

> "* * * it does not follow that the case can be disposed of * * * by holding that since the Exchange has a general power to adopt rules governing its members' relations with non-members, particular applications of such rules are therefore outside the purview of the antitrust laws." (373 U. S. at 357)

The Court went on to hold that, by reason of its anti-competitive consequences, the particular application of the Exchange's rules in that case violated the antitrust laws and was unlawful.

So, here, while the Board may have approved Toolco's acquisition of power to exercise control over an air carrier, it certainly could not and did not approve or license the use of that power as one of the means by which conspiracy, boycotting, tying and monopolization were effected in separate related industries; it did not exempt from the antitrust laws the particular unlawful applications which Toolco made of its power to control TWA.*

In another analogous decision, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690 (1962), the defendants had contended, successfully in the lower court, that certain conduct was beyond the reach of the antitrust laws because one of the alleged conspirators was, at the time, acting as an agent appointed by the Canadian government to allocate ore purchases. In reversing, this Court disposed of this argument as follows:

> "* * * there is nothing to indicate that such [Canadian] law in any way *compelled* discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become elements of an unlawful scheme. *Swift & Co.* v. *United States*, 196 U. S. 375, 396;

* It will be recalled that the Board itself warned in 1948 that its approval of the acquisition of control did not confer "a blanket, unlimited, *in futuro* approval" of the relationship as it would thereafter develop (9 C.A.B. at 389). Obviously there can be no argument that the Board's control orders exempted anything after December 1960, when Toolco's control of TWA terminated. (See pp. 32-36, *supra*). Toolco asserts (Petitioners' Brief, p. 81) that the "exemption is an unqualified and permanent one" and that "there is no more reason directly to apply the antitrust laws retroactively to the control relationship than there is to apply them prospectively." It is impossible to understand, however, how an antitrust exemption resulting from an order approving a control relationship could survive the termination of the approved control relationship so as to exempt otherwise unlawful activity thereafter.

American Tobacco Co. v. *United States*, 328 U. S. 781, 809; *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 287. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 457-458; *Slick Airways* v. *American Airlines*, 107 F. Supp. 199, 207 (D.C.N.J.)." (370 U. S. at 707) (Emphasis supplied.)

Similarly, there was nothing in the Board's approval of Toolco's acquisition of control which compelled Toolco to engage in the conspiratorial activity charged in the complaint. That activity was not necessary to do anything "authorized, approved, or required" by the Board's orders, and it was not exempt from the antitrust laws.*

The Board's Orders Since 1950 Have Not Exempted From the Antitrust Laws the Conduct Alleged in the Complaint

Petitioners next urge that, even if the original control orders did not carry with them an exemption broad enough to cover the conduct alleged in the complaint, such exemption was supplied by subsequent orders of the Board. Again the crucial point is that Congress did not confer on the Board authority to exempt anything other

* Petitioners argue that the Board's power to approve acquisitions of control and its exemptive power "serve important public purposes" and help the Board "achieve the objectives of the Act" and that these objectives would be "undermined" by construing the exemptive power as "narrowly" as did the Court of Appeals (Petitioners' Brief, p. 69). As is pointed out above, however (pp. 82 *et seq.*, *supra*), the design of Congress, which was written into the Act, was that the Board would decide between those acquisitions of control which should be permitted and those which should be vetoed; the exemptive provision assured that an acquisition of control approved by the Board would not be attacked *qua* acquisition in another forum. It in no way interferes with the achievement of this objective to subject to an antitrust suit a course of conduct, including particular exercises of the acquired control, which has an adverse impact on competition in the supplying of aircraft and financing to air carriers. The legislative history demonstrates that the public interest, as Congress saw it, could only be advanced by enforcement of antitrust policies. Petitioners have defined in their brief no "important public purpose" which would be "undermined" by the ruling of the Court of Appeals.

than the acquisition of control, and whatever the Board might have considered or might have intended, it could not grant a broader exemption. It is evident, however, that the Board did not attempt to overstep these limits. It never purported to create an exemption of the kind for which petitioners argue.

Petitioners urge that the Board effected "a continuing review, and regulatory approval or disapproval, of the whole course of conduct between the controlling party [Toolco] and the air carrier [TWA]" (Petitioners' Brief, p. 70), and that the Board must have approved the "pattern of dealing" to which the Court of Appeals referred because it approved "all the pieces of the pattern of dealing between Toolco and TWA * * *" (p. 74).

The Board did no such thing. All that was submitted to the Board subsequent to the 1950 control case was a series of separate transactions in which Toolco either sold or leased particular planes to TWA or made particular financial arrangements for TWA. As has been made clear (see pp. 30-32, *supra*), the applications submitted were brief, in each case setting out only the most salient features.

It is evident that there are many "pieces of the pattern of dealing between Toolco and TWA" which were never submitted to the Board, and of which the Board was never informed. For example, the Board was never informed of the combination and conspiracy by the defendants to monopolize the supplying of aircraft to TWA, nor was it informed of Toolco's foreclosure of competitive suppliers of aircraft from the TWA market, nor of the arrangement whereby Toolco denied financing to TWA except on condition that TWA acquire its aircraft from Toolco, nor of Toolco's exploitation of a monopoly over the TWA market to further its interests as a supplier of aircraft to other carriers, such as Pan American World Airways and Northeast Airlines. The Board was cer-

tainly never informed of the instructions which Mr. Hughes gave to executives of TWA that they should "not discuss the 990 with Convair" (p. 21, *supra*), or that they cease all contact with the Boeing company respecting the 707-131 and the 707-331 jet-powered aircraft, (*supra*, p. 21), nor was the Board ever informed of Toolco's tactics which resulted in the inordinate delay in TWA's receiving Convair 880 aircraft (pp. 26-27, *supra*).

Moreover, the applications which were made to the Board were submitted by TWA at a time when it was under the control of Toolco, and could hardly be expected to point out to the Board related behavior of Toolco detrimental to its interest. The orders modifying the original control order to permit these transactions were consistently issued in *ex parte* administrative proceedings, without a hearing, and without ever refusing, modifying or qualifying in any substantial manner the relief sought by the brief applications.

Petitioners are also wrong when they suggest that each of the Board's orders "followed the practice of *approving* the transaction and amending the original control order so as expressly to permit the transaction" (Petitioners' Brief, p. 71) (emphasis supplied). In point of fact, as is also developed elsewhere in this brief (see pp. 30-32, *supra*, and Annex A, *infra*), except for the orders approving possible changes of the amount of control, none of these orders purported to "approve" anything. Rather, in each instance, the original control order was merely amended to provide that it would not "restrict or affect the right" of Toolco to carry out the transaction or it was amended "to permit" the transaction. Indeed, the Board took pains to make it clear that these orders "shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein."*

* The language which this Court used in *United States* v. *RCA*, *supra*, to describe the exchange of stations between NBC and Westinghouse provides an interesting analogy:

There was only one basic order issued by the Board with respect to the Toolco-TWA relationship; that was the order approving the acquisition of control. The very form of the subsequent orders, mere amendments to the original order, emphasizes that the Board recognized what the statute makes clear, that the Board's only power

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"Appellees, like unregulated business concerns, made a business judgment as to the desirability of the exchange. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an unregulated concern only in that they also had to obtain the approval of a federal agency. But [the] scope of that approval in the case of the FCC was limited to the statutory standard, 'public interest, convenience and necessity.' * * * The monetary terms of the exchange were set by the parties, and were of concern to the Commission only as they might have affected the ability of the parties to serve the public. Even after approval, the parties were free to complete or not to complete the exchange as their sound business judgment dictated. In every sense, the question faced by the parties was solely one of business judgment (as opposed to regulatory coercion) save only that the Commission must have found that the 'public interest' would be served by their decision to make the exchange. No pervasive regulatory scheme was involved." (358 U. S. at 350-51)

Similarly, Toolco's decision to sell or lease aircraft to TWA or to provide financing to TWA, like the decision of any other unregulated business, was based on a business judgment as to the desirability of the transaction. Unlike the situation in the *RCA* case, Toolco did not find it necessary to obtain the "approval" of a federal agency, but only to have the agency modify its earlier order "to permit" the transaction. In granting that permission, the agency was concerned only with the "public interest" standard which it administered (and that only to a limited extent since its statutory concern was with the control relationship, not the individual transaction). It was not concerned with the impact of the transaction on competition in the field of aircraft supply and financing. "No pervasive regulatory scheme was involved." Just as in the *RCA* case the particular station exchange was alleged to be an element in a continuing conspiracy to acquire stations in five of the eight largest market areas in the country (358 U. S. at 335-36), so the individual transactions submitted by Toolco to the Board were individual elements of a continuing conspiracy to restrain and monopolize trade and commerce. It is submitted that Toolco's conduct, like the conduct condemned by this Court in the *RCA* case, is subject to antitrust attack.

is to approve or veto acquisitions of control, and that the Board was simply finding that what was presented to it did not justify an attempt to withdraw the prior, conditional approval.

Nor is petitioners' argument helped by references to the "extensive mass" of information in the Board's files as a result of various reporting requirements and to "voluminous records compiled" in the course of rate-making and other proceedings. These references to voluminous, but unidentified materials, *dehors* the record and, so far as anyone can tell, totally unrelated to the allegations of the complaint, do not indicate that, in connection with the Board's approval of the discrete transactions submitted to it since 1950, it also considered, or was even aware of, the course of conduct alleged in this complaint. Indeed, the fact that the Board's staff utilized the discovery being made by Toolco to TWA in this case as a source of information when it thought it might be able to raise in the *Northeast Control* case the issue of Toolco's mismanagement of TWA (see p. 54, *supra*) strongly indicates that no such material was already available in the Board's files. As is made clear in the Counter-Statement of the case, this inquiry by the Board's staff was shut off before it was well under way so that, even in the *Northeast Control* case, these matters were not aired (pp. 53-58, *supra*). In any event, the existence or non-existence of these allegedly "voluminous" materials in the Board's files can have nothing whatever to do with the scope of the antitrust exemption which the Board is authorized to create either by orders under Section 408 or by amendments to such orders.

The petitioners next suggest that the position taken by the Court of Appeals and by respondent makes the Board's practice of conditioning its control orders "a useless appendage" (Petitioners' Brief, p. 70), that it is an attempt "to denigrate the Board's power to grant transactional

approvals through the conditioning process" (*ibid.*), and that "to argue that the exemptive power under Section 414 only extends to the simple acquisition of control amounts to nothing more than an argument that the Board's powers under Section 408 are similarly limited, which obviously cannot be maintained" (p. 71).

It is perfectly obvious, of course, that neither the Court of Appeals nor the respondent here attempts to deny or denigrate the Board's power to condition its orders approving acquisitions of control. As the Court of Appeals pointed out:

> "* * * the Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable, and thereby retain a continuing jurisdiction over the activities of the controlling party * * * but the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed 'the regulation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB." (R. 1423) (Footnote omitted.)

TWA, like the Court of Appeals, recognizes that the Board was authorized to condition its approval of Toolco's acquisition of control in precisely the manner in which it did. The difference between TWA and the petitioners is not with respect to the Board's power to do what it did, but rather with respect to the effect of what the Board did. TWA denies that the attaching of conditions to the approval order extended the Board's exemptive authority beyond that specifically defined in Section 414 of the Act.

This Court has made it clear that the Board should not be allowed to "improvise on the powers granted by Congress", so as "to do indirectly what it cannot do directly." *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U. S. 316, 328, 330 (1961).

The crux of the matter is that the Board cannot, by imposing conditions, confer on itself a power to grant immunity which it does not otherwise have. The Board's power to approve and thereby render legal what would otherwise be illegal is limited to the scope of Sections 408, 409 and 412. None of these sections relates to supply contracts or financing of air carriers. Such arrangements are outside the area of the Board's control. It has no control, for example, over security issues or the assumption of other obligations or liabilities by air carriers. As the Board indicated in the 1950 control case, it had repeatedly requested legislation granting such control without success. *Trans World Airlines, Inc., Further Control by Hughes Tool Company,* 12 CAB 192, 224 (1950). Similarly, no provision of the Federal Aviation Act gives the Board power to require submission for approval of supply contracts between airlines and their suppliers. It follows that if such contracts should be illegal, because of improper exclusive clauses or for some other reason, the parties cannot immunize themselves from liability to injured persons by submitting the contracts to the Board.

If the conditioning of an order were given the effect for which petitioners argue, it would be within the power of the Board to circumvent entirely the carefully drawn limitations on its power to exempt from the antitrust laws which Congress wrote into Section 414. The Board could, for example, enter an order approving Toolco's acquisition of control of TWA on condition that Toolco not attempt to monopolize the supply of aircraft or not conspire with others to fix the prices of aircraft. On Toolco's theory, if Toolco thereafter advised the Board that it intended to engage in a course of action amounting to such a conspiracy or monopolization and the Board did not withdraw its approval of the control relationship, the conspiracy or monopolization would thereby

be exempted from the antitrust laws. It is surely evident that the Board, which is charged with the regulation of the civil air transportation industry, has no authority to arrogate to itself, by its unilateral act, a power to nullify antitrust laws applicable to the commerce involved in the businesses of furnishing aircraft or financing to airlines.

No Preliminary Reference to the Board is Appropriate

Petitioners' final line of defense with respect to the exemption argument is that, at least, the matter should be referred to the Board to determine the scope of the antitrust exemption created by its orders.*

This argument seems to assume that the business of the Board is granting exemptions from the antitrust laws. Thus, petitioners argue:

> "• • • it should be held that any possible question as to the scope of the antitrust exemptions afforded

* Petitioners also suggest that if the Board "was not apprised of some 'backdrop' to the transactions it approved" the appropriate procedure is for a party in interest to submit a petition to the Board to modify or sustain its prior orders (Petitioners' Brief, p. 79). It is evident that such a procedure would afford no relief in this case. To the extent that this "backdrop" might have been relevant to the function which the Board was performing under Section 408, submission of that material to the Board now cannot provide a remedy for Toolco's past transgressions. The control relationship which the Board was considering when it modified the original *Control Order* to permit the various transactions submitted to it was a control relationship which terminated in December 1960 and which has not been resumed. Thus, if the presentation of these matters to the Board in the 1950's would have induced it to compel termination of the control relationship which then existed, it is too late to seek such a remedy. Such information may, of course, have relevance in the new Section 408 proceeding which the Board must now conduct with respect to Toolco's recent attempt to reassume control of TWA, but that hearing will not be concerned with, and cannot provide a remedy for, the correction of past injustice. It is perfectly evident that the Board is not equipped in any proceeding available to it to deal with the pattern of conduct complained of by respondent and which caused it, and its many thousands of independent stockholders, immense injury.

> by the various Board orders in the continuing FAA §408(b) proceeding should be a matter for the Board to resolve, at least in the first instance." (Petitioners' Brief, p. 80)

In fact, the business of the Board is approving or disapproving acquisitions, relationships or agreements which fall within its jurisdiction; so far as the Board is concerned it is an incidental effect of its approval that particular conduct may be exempted from antitrust prosecution. The Board may not issue an exemption separate and distinct from its approval of activity which requires its approval. Once the Board has issued an approval order, then the exemption flows from the statute and is limited to whatever is "authorized, approved, or required" by the approval order. The scope of the exemption depends upon the statute, not upon what the Board might intend to confer.

The ruling of the Court of Appeals that no preliminary reference to the Board was necessary is in accord with prior decisions. For example, in *River Plate & Brazil Conferences* v. *Pressed Steel Car Co.*, 227 F. 2d 60, 63 (2d Cir. 1955), the Second Circuit held that where the only question to be decided is whether the Board has or has not approved a particular transaction, the court is quite capable of answering that question for itself. See also *Putnam* v. *Air Transport Association of America*, 112 F. Supp. 885, 886 (S.D.N.Y. 1953).

The decisions relied upon by petitioners are not to the contrary. For example, in *United States* v. *Railway Express Agency, Inc.*, 89 F. Supp. 981, 987 (D. Del. 1950), the court made it clear that it was not staying the antitrust suit "for want of power or jurisdiction in this court or by reason of primary jurisdiction in the Commission." Rather, in view of the fact that there was pending before the Commission a proceeding the result of which might have an important bearing on the

antitrust suit, the court stayed the action as an exercise of its own discretion in order to secure the benefit of the proceeding then pending before the Commission.

The decision in *American Union Transport* v. *River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y. 1954), *aff'd on opinion below*, 222 F. 2d 369 (2d Cir. 1955), is equally irrelevant. In that case plaintiff brought a treble damage action, alleging that he had been injured by an agreement between defendant steamship lines which was required to be filed under Section 15 of the Shipping Act, which had not been filed, and which, if filed and approved, would be exempt from the antitrust laws. The court held, quite properly, that the action could not be maintained and should be dismissed. Plaintiff, in that case, had also filed a suit with the Board seeking reparations under Section 22 of the Shipping Act. This was not a case in which there was a reference to the Board to determine the scope of an exemption. Rather, this was a case in which the Board clearly had exclusive jurisdiction since the agreement which formed the basis of plaintiff's cause of action was an agreement required to be filed with the Board and which the Board had explicit authority to exempt from the antitrust laws.

The decisions in *Apgar Travel Agency* v. *International Air Transport Association*, 107 F. Supp. 706 (S.D.N.Y. 1952), and in *S.S.W., Inc.* v. *Air Transport Association*, 191 F. 2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U. S. 955 (1952), (Petitioners' Brief, p. 80) are both irrelevant, and for substantially the same reasons. In the *Apgar* case, plaintiff brought suit against a number of defendants engaged in air transportation. The complaint alleged an unlawful agreement among these carriers, which agreement was required to be filed with the Board under Section 412 of the Federal Aviation Act and which, if filed and approved, would be, by the express language of the Act, exempt from antitrust prosecution pursuant to Sec-

tion 414. Since treble damages were sought, the court thought the proper relief was to stay the suit pending administrative action by the Board. Again, the need for primary resort to the Board was obvious since the claim was based upon an agreement among persons involved directly in air transportation, and the agreement was one required to be filed with the Board, and which the Board might exempt. Significantly, the court emphasized in its opinion that the actions complained of "directly" involved "the economic conduct of air carriers" and that "the air transportation industry is a regulated industry, which, in the judgment of Congress has been given a special status in relation to the antitrust laws."

Similarly, in the *S.S.W.* case, the conduct complained of was essentially, an agreement among air carriers which had not been filed with the Board but which was required to be filed. Again, since treble damages were sought, the appropriate remedy was held to be a stay of the action. The court observed that:

> "• • • in each case brought against a regulated company under the antitrust laws, the subject matter and remedy afforded by the regulatory statute are compared with that of the antitrust laws. If the latter either cover subject matter outside the scope of the Commission's power or provide a remedy which the Commission may not give, then they remain in effect to that limited extent." (191 F.2d at 661)

In the instant case, unlike the cases upon which petitioners rely, defendants are not air carriers, the conduct complained of affects trade and commerce outside the industry which the Board is charged to regulate, and the practices complained of are practices as to which the Board cannot provide an effective remedy. Moreover, the acquisition of control has already been submitted to and passed upon by the Board. The Board has exercised

its jurisdiction and TWA does not contend that the Federal Aviation Act has been violated or that it is entitled to any remedy thereunder with respect to defendants' practices.

It is within the competence of the courts to determine the scope of the statutory exemption resulting from the Board's action, and no reference to the Board is either necessary or appropriate.

III. The Complaint clearly states claims upon which the plaintiff can be granted relief, and accordingly the District Court had jurisdiction to enter the default order.

It would be an extraordinary result indeed to hold that, in the posture in which this litigation is presented to the Court, the complaint fails sufficiently to state a claim to permit the suit to be maintained.

This Court has, of course, frequently emphasized the basic policy of the antitrust laws to encourage private suits by making available to plaintiffs free access to the federal courts in private antitrust actions. *E.g., Radovich* v. *National Football League,* 352 U. S. 445, 454 (1957). In *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464 (1962), this Court explained the reasons why a summary disposition of an antitrust claim, prior to an opportunity to develop the facts fully, is inappropriate:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (368 U. S. at 473)

This Court has also made it clear that antitrust complaints are not to be fragmentized. The entire course of conduct is properly to be considered as a whole, without

singling out individual acts as petitioners seek to do here. Thus, in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962), this Court said:

> "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '• • • [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts but only by looking at it as a whole • • •'"

A summary disposition for failure to state a claim would be particularly inappropriate in this case since, while defendants have had a monumental amount of pre-trial discovery, TWA has been permitted to take not a single word of deposition testimony, and the evidence which it has been able to accumulate has been derived principally from depositions conducted, not by it in an effort to develop its case, but by defendants themselves. The Court of Appeals pointed out that the Federal Rules of Civil Procedure require only

> "'• • • "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests'"

and continued:

> "It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendant denied the plaintiff the right through pre-trial discovery to add more detail and substance to the allegations set forth in the complaint." (R. 1427)*

* Petitioners' efforts to suggest that the claim alleged is merely one charging mismanagement, spiced with antitrust epithets, requires no extended response. The complaint is replete with allegations, not of legal conclusions but of facts, which are more than adequate to establish the antitrust violations claimed. Indeed, few if any of the complaints which have been before this Court on challenges as to their sufficiency have allegations equally detailed and precise. Com-

One of the techniques principally employed by petitioners in their challenge to the sufficiency of the complaint is to ignore allegations, the thrust of which they are unable to turn aside. A striking example is the persistent statement by petitioners that the relevant markets referred to in the complaint

> "• • • are all defined in terms of TWA's requirements for aircraft • • •" (Petitioners' Brief, p. 4)

and that:

> "• • • the 'substantial segment' of a commerce which is the subject of the alleged violations is merely that segment represented by the requirements of TWA out of all of the aircraft 'operated by all scheduled air carriers' in the United States and between the United States and foreign cities." (Petitioners' Brief, p. 91)

Petitioners are able to make these statements only because, in discussing the trade and commerce involved, they refer only to paragraph 8 of the complaint, and refuse to recognize the existence of paragraph 7. Paragraph 7 is the basic paragraph defining the trade and commerce alleged to be involved in defendants' violations. It defines a number of different markets and includes not only the supplying of aircraft and financing to TWA, but also the supplying of "aircraft" and "jet-powered

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pare, for example, Mr. Justice Clark's summary of the allegations of the complaint which was sustained in *Radovich* v. *National Football League*, 352 U. S. 445, 448-49 (1957). Petitioners' painfully pruned excerpts from the deposition testimony (Petitioners' Brief, p. 89), designed, presumably, to indicate that the antitrust claim was asserted disingenuously or in bad faith, are as irrelevant as petitioners' suggestion is unwarranted and improper. They attest merely to the fact—equally irrelevant to the sufficiency of the complaint—that the commencement of this litigation, and the manner in which it was commenced, were carefully considered by client and counsel, and that the antitrust claim, as well as the common law claim joined with it, were asserted because they were believed to be well founded and likely to secure for TWA the maximum redress for past injuries and protection for the future.

aircraft" by sale, lease or other means to "TWA and other air carriers" (A-3). Even if the trade and commerce involved were restricted to TWA's requirements for aircraft and financing, which are more fully described in paragraph 8 of the complaint, it is submitted that the complaint would be sufficient, but, in fact, the trade and commerce alleged to be involved are much broader than petitioners are willing to admit.

The Complaint Alleges Claims Under Section 1 of the Sherman Act

The complaint sufficiently alleges (a) the necessary joint action, and (b) facts which fall within at least three different categories of practices long held to be violative of Section 1 of the Sherman Act: an unlawful conspiracy to appropriate a captive market, an unlawful conspiracy to boycott, and an unlawful tying arrangement.

(a) The Complaint Sufficiently Alleges Unlawful Joint Action

Petitioners seek to argue that the complaint does not allege a combination or conspiracy (Petitioners' Brief, p. 96, n. 7). Their technique is to ignore Atlas as a conspirator by branding the allegations with respect to Atlas as "frivolous", and to argue that Hughes, Toolco and Toolco's officer, Holliday, cannot be charged with joint action since joint action may not take place "solely between a corporation and officers acting in its behalf."*

It is evident that the allegations of combination and conspiracy are adequate. *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464 (1962). Even if the proof were to show that the conspiracy was confined to Hughes,

* Citing *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911 (5th Cir. 1952), *cert. denied*, 345 U. S. 925 (1953) and the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), pp. 30-36.

Holliday and Toolco, this would be sufficient. It has been held that a sole stockholder may conspire with a corporation. *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956); see also *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). It has also been held that a conspiracy may exist among subsidiaries of a common parent unless it is shown that use of separate corporations was without economic significance. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *Kiefer-Stewart* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *Sunkist Growers* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962).*

It is absurd—and contrary to allegations which TWA is prepared to prove—to suggest that Hughes was acting merely as Toolco's agent. Hughes not only owned 100% of the stock of Toolco, but also had a beneficial ownership of

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* Mr. Victor Kramer, of counsel for petitioners on their brief here, has elsewhere summarized the relevant authorities as indicating that a conspiracy in violation of the Sherman Act may exist between a corporation and two or more of its officers:

> "In [*United States* v. *General Motors*, [121 F. 2d 376 (7th Cir. 1941), *cert. denied*, 314 U. S. 618,] [*United States* v.] *Yellow Cab* [*Co., supra*], and *Schine* [*Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948),] the respective groups of defendants acted as a single economic unit; in fact, in the *Yellow Cab* case, they were all controlled by a single man. These authorities suggest that Section 1 of the Sherman Act makes unlawful restraints of trade imposed by a single trader if the requisites of conspiracy, as that term is generally understood, are met. The *Mininsohn* [v. *United States*, 101 F. 2d 477 (3rd Cir. 1939),] and similar cases discussed above * * * demonstrate that the requisites of conspiracy law are satisfied when two or more officers of a single corporation are shown to have acted in concert to commit a crime on behalf of the corporation.
>
> "If a contrary result were to be reached under the Sherman Act a significant loophole would be afforded corporations engaging, without the assistance of outsiders, in activities that unreasonably restrain trade." Kramer, *Does Concerted Action Solely Between a Corporation and its Officers Acting on its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?*, XI Federal Bar Journal 130, 141 (1950).

voting trust certificates with respect to 11% of the common stock of Atlas, a holding company which controlled Northeast Airlines (Complaint, paragraph 6, A-2). The *Nelson* case, upon which petitioners rely, makes it clear that its holding does not apply to conspiracies between a corporation and its officers or agents if the latter do not act solely in their capacity as officers and agents and are instead "actuated by motives personal to themselves" (200 F. 2d at 914), as in this case.* The fact that Hughes—one of the world's richest and most powerful men—was an officer of Toolco—one of the nation's great industrial corporations—during part of the conspiracy does not insulate the conspirators or the conspiracy against attack under the antitrust laws.

Moreover, there is no reason to brush off the allegations with respect to Atlas. The complaint alleges that Hughes, Toolco, Holliday and Atlas, acting in concert, planned and attempted to foist upon TWA an unfavorable merger, all as a part of their overall conspiracy to restrain trade. One purpose of the alleged merger was to enlarge TWA's requirements for new aircraft and thereby increase the market for aircraft from which the defendants would be able to foreclose competition from other suppliers of aircraft (Complaint, paragraph 21(a), A-13). It is evident from the complaint that the proof would show joint action by Atlas at least as to the Northeast aspect of the case, and probably more. Had discovery progressed further, other conspirators might have been identified.

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* Similarly while there was a considerable variety of opinions among the members of the Attorney General's Committee as to this issue, most members of the Committee recognized that there are many circumstances in which a combination or conspiracy may exist between a parent corporation and its subsidiary (or, presumably, between a corporation and its private owner). See *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), pp. 30-36.

(b) The Complaint Alleges an Unlawful Conspiracy to Appropriate a Captive Market

The complaint alleges a conspiracy among the defendants to appropriate and retain for themselves the TWA market as a captive market for financing and aircraft. The claim alleged here is closely analogous to that which was sustained by this Court in *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). In that case the government alleged that a manufacturer of taxicabs, and certain persons and corporations affiliated with it, had secured controlling interests in cab operating companies in various important cities and that, after securing control of these companies, the defendants insisted that the operating companies purchase their cabs exclusively from the defendant manufacturer. The Court held that this complaint stated a claim under Section 1 of the Sherman Act:

> "Nor can it be doubted that combinations and conspiracies of the type alleged in this case fall within the ban of the Sherman Act. By excluding all cab manufacturers other than CCM [the defendant manufacturer] from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. • • • In addition, by preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees denied those companies the opportunity to purchase cabs in a free, competitive market." (332 U. S. at 226-27)

Petitioners attempt to deal with TWA's allegations by citing this Court's decision in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 523 (1948), as authority for a supposed axiom that a subsidiary will normally deal only with its parent for any goods the parent can furnish (Petitioners' Brief, p. 94). They deduce from this that a com-

petitive restraint and a monopolization of the TWA market was an inescapable concomitant of the acquisition of control which the Board approved in 1944, and that this Court's authority therefore supports allowing to Toolco and Hughes full exploitation of this captive market, in complete freedom from antitrust prosecution.

It is, of course, absurd to suggest that a course of conduct involving a parent and its subsidiary must be attacked as an acquisition or not at all. The complaint in this case, in charging the appropriation of a captive market in violation of Section 1 of the Sherman Act, alleges not merely an acquisition of control, but a course of conduct in which that acquisition was used as a tool. The *Yellow Cab* decision makes clear that a course of conduct appropriating a captive market in restraint of trade is not validated merely because it occurs in a context of corporate affiliation. Thus, the Court there said:

> "The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated under a common ownership as from a conspiracy among those who are otherwise independent. • • •
>
> "And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act." (332 U. S. at 227)

Petitioners' argument that the Board's approval of the acquisition of control prevents prosecution of the practices and course of conduct alleged in the complaint, while presented in their Point IV in different words, amounts to the same thing as the contention made in their Point II. The scope of the exemption depends upon the

language and intent of the statute and the considerations explored in our Points I and II above. We have shown that it was not within the meaning or intent of the statute that the Board should, by approving the acquisition, license petitioners to act as they have acted here, and we have shown that the Board did not, in fact, purport to give them that license.

Even if the acquisition had been attacked in an antitrust suit under Section 7 of the Clayton Act, and had actually been adjudicated not to violate that section, it would not follow that the later conduct of the acquiring person, in relation to the acquired company and otherwise, would thereafter be free from further antitrust attack. We have seen that, even under Section 7, an acquisition of control which in its original bare outlines did not unduly threaten competition, may subsequently, by virtue of its use, become unlawful. *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586, 596-98 (1957).*

Petitioners also seem to suggest that their appropriation of the TWA market for financing and aircraft, and their exclusion of all others from that market, is to be excused because:

> "Toolco was not a manufacturer of aircraft of the sort needed by TWA and did not compete with any aircraft manufacturers in the production of aircraft for ultimate use by TWA." (Petitioners' Brief, p. 96)

In an earlier brief** Toolco conceded that:

> "* * * if it were a manufacturer and supplier of flight equipment for air carriers and forced TWA

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* "Even when the purchase is solely for investment, the plain language of §7 contemplates an action at any time the stock is used to bring about, or in attempting to bring about, the substantial lessening of competition." (353 U. S. at 597-98)

** Reply Brief of Defendants-Appellants Hughes Tool Company and Raymond M. Holliday in the United States Court of Appeals for the Second Circuit in No. 28405, p. 19, note (October 15, 1963).

> to acquire only equipment manufactured by it, such conduct, *absent CAB approvals and authorizations*, might be in violation of the antitrust laws and • • • cases such as *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), upon which TWA relies, might be relevant to this action."

It can make no difference, however, whether Toolco manufactures the equipment itself or whether it supplies equipment secured from others. In either event, it is a violation of the antitrust laws for Toolco to utilize its economic power over TWA to seize for itself the position of sole supplier of aircraft to TWA, thereby preempting that market. A person who has foreclosed competition in a market cannot avoid prosecution by arguing that he has fed into the market aircraft which he has purchased from others. For example, in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949), and *Richfield Oil Corp.* v. *United States*, 99 F. Supp. 280 (S.D. Calif. 1951), *aff'd per curiam*, 343 U. S. 922 (1952), the foreclosure of markets by use of exclusive dealing arrangements respecting products, not manufactured by defendant oil companies but purchased and resold by them, was held to be illegal under Section 3 of the Clayton Act. See also *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960), *rehearing denied*, 286 F. 2d 840 (1961), *cert. denied*, 366 U. S. 963. Toolco's concession that it would be guilty of an antitrust violation if it had been a manufacturer, logically leads to the conclusion that it is also guilty of an antitrust violation as a supplier.

(c) The Complaint Alleges an Unlawful Conspiracy to Boycott

The complaint alleges that defendants conspired to prevent TWA from dealing with alternative sources of equipment and financing, and that TWA was, in fact, prevented from dealing with such alternative sources. The illegality

of agreements not to deal with a third person or not to permit others to deal with him has been settled at least since this Court's decision in *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941). Boycotts of this nature are no less illegal when conducted by affiliated persons. *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 79 (7th Cir. 1949). Indeed, this Court has held that such arrangements are illegal *per se*. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959).

Petitioners' first response to this claim is that the word "boycott" is used in the complaint "epithetically" and that "it is clear that when the complaint says 'boycott' it does not mean 'boycott' as that term is used in antitrust cases" (Petitioners' Brief, p. 97). Among the allegations of the complaint, however, are allegations that, for example, during the period when other United States flag air carriers were placing orders for jet-powered aircraft:

> "* * * the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise, of any jet-powered aircraft." (Complaint, paragraph 17, A-12).

These and other allegations of the complaint make it clear that the complaint does not merely use the word "boycott" as an epithet, but that it alleges facts closely analogous to facts like those in *Fashion Originators' Guild* v. *Federal Trade Commission, supra*, where this Court held to be unlawful joint action on the part of defendant garment manufacturers whereby they compelled retailers to cease purchasing from other garment manufacturers who pirated the defendants' designs.

In fact Hughes and Toolco, throughout the crucial period involving the development and acquisition of jet aircraft, were actively pursuing at least three different

plans for development and manufacture of jet-powered aircraft for commercial transport, either alone or in collaboration with other manufacturers such as AVRO of Canada, Sud Aviation of France, and the Convair Division of General Dynamics Corporation. (See pp. 16, 25, *supra*.) Of these plans, the one which ultimately was carried out was the joint development with Convair of jet aircraft, later called the 880, to be produced by Convair, and as to which Toolco would have a preferred marketing position, exploitable in its dealings with other carriers as well as TWA. The boycott was designed to assist Toolco in establishing and exploiting this position.

In suggesting that "no court has ever held illegal the selection by a parent of those persons with whom its subsidiaries may deal" (Petitioners' Brief, p. 98), petitioners overlook the *Yellow Cab* decision where the crux of the unlawful conduct alleged was that the defendant cab manufacturer, which controlled various cab operating companies, insisted "that they purchase their cabs exclusively from [it]" (332 U. S. at 224).

Petitioners' only other answer to the boycott charge is their argument by way of hypothetical example that:

> "If A coerces B to boycott C, B has no claims under the antitrust laws for damages against A on account of the boycott • • •." (Petitioner's Brief, p. 98)

Petitioners cite no authority for this surprising conclusion and it seems quite inconsistent with this Court's recognition in the *Yellow Cab* case that, not only were competing taxicab manufacturing companies injured by the boycott which the defendant manufacturer coerced its controlled operating companies to effect, but also that the controlled operating companies were hurt:

> "• • • the trade of the controlled cab companies is restrained since they are prevented from purchasing cabs from manufacturers other than CCM. The

result allegedly is that these companies must pay more for cabs than they would otherwise pay, their other expenditures are increased unnecessarily, and the public is charged high rates for the transportation services rendered." (332 U. S. at 224-25)*

Petitioners' argument is conclusively refuted by this Court's recent decision in *Simpson v. Union Oil Co.*, 377 U. S. 13 (1964). In that case the Court of Appeals had held that a gasoline station operator suffered no actionable injury as a result of being coerced by the oil company from whom he took gasoline on consignment to sell at a price fixed by the oil company. This Court reversed, holding that a retail outlet coerced by his supplier to engage in unlawful resale price maintenance has suffered actionable harm (see 377 U. S. at 16-17, 25). No relevant distinction is apparent between the *Simpson* case and the instant case.**

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* In the record at T-33 is a memorandum by a senior officer of the Bank of America reporting a telephone conversation with Hughes in which Hughes refers to a proposed arrangement involving a commitment by him to buy all his requirements of aircraft (including, of course, 100% of TWA's purchases) from Convair. In pointing out the special advantages available to Convair through his control of TWA, Hughes observes that if TWA were under independent management it would *"undoubtedly have to buy its aircraft competitively"*. In context, this is an extraordinarily frank admission that the aircraft he was selling to TWA would not be the ones it would buy if it had freedom of choice and competitive considerations prevailed.

** There are many other decisions to the same general effect. *E.g., Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.*, 166 Fed. 254, 261 (2d Cir. 1908); *Ring* v. *Spina*, 148 F. 2d 647, 652-53 (2d Cir. 1945); *Bales* v. *Kansas City Star Co.*, 336 F. 2d 439 (8th Cir. 1964). As this Court observed in *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948): "The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

(d) The Complaint Alleges an Unlawful Tying Arrangement

The complaint alleges that defendants tied the supply of financing to TWA and the furnishing of aircraft to TWA to each other. Such tying arrangements have been held by this Court to be illegal, *per se*, under Section 1 of the Sherman Act. See, *e.g.*, *Northern Pacific Railway* v. *United States*, 356 U. S. 1 (1958). According to the *Northern Pacific* case, the only proof necessary to demonstrate the illegality of such an arrangement is that the seller has "sufficient economic power to impose an appreciable restraint on free competition in the tied product" (356 U. S. at 11). Such "economic power" does not require a showing of market dominance; it may be inferred simply from mere desirability or uniqueness of the product or service controlled by the seller. *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962). There can be no doubt that the complaint in this case establishes that Toolco, and its co-conspirators, had sufficient economic power and sufficient leverage with respect to TWA to impose an appreciable restraint on free competition in the supplying of aircraft and financing to air carriers.

Petitioners' only response to this charge is a renewal of the argument, considered above, that the Board's control orders exempted such conduct from antitrust attack and a renewal of the additional argument, also considered above, that no unlawful tying arrangement could exist since Toolco was not a manufacturer of aircraft of the sort needed by TWA. As we have noted, the decisions in *Standard Oil Co. of California* v. *United States*, *supra*, *Richfield Oil Corp.* v. *United States*, *supra*, and *Osborn* v. *Sinclair Refining Co.*, *supra*, all establish that a supplier who does not manufacture the goods sold may be guilty

of entering into an unlawful exclusive dealing or tying arrangement.*

The Complaint Alleges Unlawful Exclusive Dealing in Violation of Section 3 of the Clayton Act

A contract or understanding which precludes dealings with competitors may be illegal under Section 3 of the Clayton Act as well as under Section 1 of the Sherman Act. Under Section 3 of the Clayton Act it is necessary to show only that the understanding or agreement results in a reasonable probability of harm to competition. A violation of Section 3 of the Clayton Act is clearly alleged in paragraph 20 of the complaint in the following language:

> "During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. *Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof.* The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA." (A-13) (Emphasis supplied.)

* Nor is any reason suggested why an unlawful tying arrangement may not be found to exist between affiliated entities. In *Associated Press* v. *Taft-Ingalls Corp.*, CCH 1965 *Trade Cas.* ¶71,348 (6th Cir., Jan. 18, 1965), the Court held unlawful a tying agreement between a non-profit membership corporation and a member thereof.

The allegations in this paragraph are of facts, not conclusions, and they are plainly adequate to establish the offense alleged. Petitioners' arguments against this claim merely reiterate arguments considered above and need not be discussed further.

The Complaint Alleges a Violation of Section 2 of the Sherman Act

The complaint alleges both a combination and conspiracy to monopolize (Complaint, paragraph 9(d), A-8-9) and an attempt to monopolize (Complaint, paragraph 9(e), A-9) a substantial segment of the interstate and foreign trade and commerce of the United States.

Again, petitioners' first tactic in discussing this charge is its suggestion that the "substantial segment of interstate and foreign trade and commerce" referred to is merely "that segment represented by TWA's requirements for aircraft" (Petitioners' Brief, p. 93). As has been pointed out, this statement ignores the allegations of paragraph 7 of the complaint which describes a number of separate markets, among which are:

> —the TWA market for U. S. manufactured jet aircraft,
>
> —the entire U. S. market for U. S. manufactured civilian jet transport aircraft generally,
>
> —the entire U. S. market for U. S. manufactured civilian transport aircraft.

It also clearly appears from the complaint that each of the alleged markets is substantial. The percentages of preclusion alleged ranged from about 12.5% of all aircraft sold to U. S. flag carriers (based on TWA's 12.5% of passenger miles flown in 1960 by scheduled U. S. flag carriers) to 100% of TWA's total jet aircraft requirements.

The problem of market definition, of course, depends upon a variety of circumstances. *E.g., United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956). A specialized segment of an industry may be a separate market. Thus, in *International Boxing Club* v. *United States*, 358 U. S. 242 (1959), "championship boxing contests" rather than all boxing contests, were held to be the relevant market. It has also been held in some cases that a market may be defined in terms of the requirements of particular customers. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947); *United States* v. *Klearflax Linen Looms*, 63 F. Supp. 32, 37 (D. Minn. 1945). Applying these principles, one of the relevant markets here may consist of TWA's requirements for jet-powered aircraft, which are alleged to constitute a separate and distinct market "by reason, *inter alia*, of design and flight characteristic requirements, fleet and operating requirements, and the structure of the domestic and foreign routes of TWA" (Complaint, paragraph 8(e), A-5).

The complex problem of market definition is not one which can easily be considered at the preliminary stages of a litigation. It would certainly be inappropriate, because of doubt as to the proper market alone, to dispose of TWA's Section 2 claim at this stage of the proceedings. The complaint sets forth a number of relevant markets and alleges the existence and exercise of the power to exclude others from these markets. Under the decisions, this constitutes an adequate allegation of the offense of monopolization in violation of Section 2. *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811 (1946); *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377, 391 (1956).

Since a specific intent to monopolize is pleaded, the complaint also properly alleges an attempt to monopolize. *United States* v. *Griffith*, 334 U. S. 100, 105 (1948), which would be in violation of the statute even if defendants'

acts fell short of full monopolization. For the same reason the complaint alleges a conspiracy to monopolize, which is illegal if any appreciable part of interstate commerce is the subject of the conspiracy. *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 573 (2d Cir. 1961).

Petitioners' next response to the monopolization charge is its argument that it is not an aircraft manufacturer, and therefore cannot be guilty of monopolization of the supplying of aircraft. As has been demonstrated above, a person who is not a manufacturer of a product has frequently been held guilty of restraining trade in the sale of that product. No reason appears why Toolco cannot be found guilty of monopolizing the sale of aircraft in some or all of the markets defined in the complaint. It clearly appears, for example, that the market consisting of the requirements of TWA, which has been alleged to be, and may well be found to be, a separate market, has been entirely foreclosed and monopolized by Toolco.

Petitioners' only other response to the monopolization claim is a repetition of its argument that:

> "• • • it could hardly be argued that an act which does not violate Clayton Act § 7—acquisition of a controlling interest in a carrier by an aircraft supplier—could amount to a violation of Sherman Act § 2, because, in the exercise of that control, Toolco monopolized TWA's aircraft purchases." (Petitioners' Brief, pp. 94-95) (Footnote omitted.)

We need only point out, again, that it has never been held that Toolco's acquisition of its interest in TWA would not have violated Clayton Act Section 7, absent approval by the Board. If an antitrust court had considered that question, it might well have found a violation. Even more important, the monopolization, the attempt to monopolize, and the conspiracy to monopolize are not alleged to consist of the acquisition of the controlling interest

alone. They are alleged to consist of the entire course of conspiratorial activity outlined in the complaint. What petitioners' argument again boils down to is their original contention that the Board's control order, and the exemption which flowed from it, were broad enough to encompass, not only the acquisition of control, but all of the conduct alleged in the complaint. The deficiencies of that argument have been demonstrated.*

The Third Claim Alleges a Claim Under the Common Law Sufficient to Give the District Court Jurisdiction

In the third claim set out in the complaint, TWA seeks relief, at common law, for defendants' actions since December of 1960, which also provide the basis for TWA's second claim, asserting an antitrust violation based on this same conduct. Petitioners misname this claim as a cause of action for "corporate mismanagement" (Petitioners' Brief, p. 100, n. 8). The claim is, in fact, a claim for wilful and malicious interference with advantageous business relations. The facts upon which it is based relate entirely

* In addition to violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, the complaint also alleges a violation of Section 7 of the Clayton Act. Since the district court has reserved for future determination the question whether TWA is entitled to divestiture by Toolco of its stock in TWA, or to other equitable relief, which are the only specific questions as to which a Section 7 violation is relevant, the sufficiency of TWA's allegations under that section is not raised on this appeal. It should be noted, however, that TWA's claim based upon Section 7 of the Clayton Act does not require proof that Toolco "controls" TWA. TWA concedes that Toolco has not "controlled" TWA since December of 1960. Section 7 may be violated by an acquisition of stock, where that stock is used in such a way as substantially to lessen competition even though the stock interest is insufficient to confer control over the corporation. *E.g.*, *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307, 317 (D. Conn.), *affirmed*, 206 F. 2d 738 (2d Cir. 1953); *National Supply Co.* v. *Hillman*, 57 F. Supp. 4, 7 (W.D. Pa. 1944).

to a period during which Toolco had no power to control or manage TWA.*

The principal allegations which form the basis for the common law count are allegations that TWA entered into an agreement dated April 30, 1961 with Boeing to purchase aircraft, that shortly thereafter TWA was negotiating with certain insurance companies and banks to finance these aircraft, that, in order to force TWA instead to purchase aircraft from Toolco, defendants interfered with these arrangements by sending a telegram to Boeing on May 31, 1961 casting doubt on the power of TWA's management to purchase aircraft from Boeing and to finance the purchase, that defendants also interfered with these arrangements by notifying the lending institutions which were contemplating the financing that the voting trust was invalid, that any financing would be invalid and threatening the institution of suits against them, and that defendants further interfered with these arrangements by making public statements designed to interfere with the conclusion of these arrangements and designed to depress the market for certain securities which were to be sold by TWA as a part of the financing (Complaint, paragraphs 37-45, A-18-20).

These allegations are clearly sufficient to make out a cause of action at common law for intentional interference with another's contract or business relationships with the purpose or result of inflicting actual damage. See, *e.g.*, *Campbell* v. *Gates*, 236 N. Y. 457 (1923); *Hornstein* v. *Podwitz*, 254 N. Y. 443 (1930); *Keeble* v. *Hickeringill*, 11 East 574n. (K.B. 1706). The allegations upon which the common law claim is based assert the same facts as those which constitute the allegations of the second

* Thus the entire argument in Petitioners' cited footnote misses the point. There is nothing unusual about a claim alleging malicious interference with business relations being based on facts similar to those underlying an antitrust claim.

antitrust claim, so that the doctrine of pendent federal jurisdiction applies. *Hurn* v. *Oursler*, 289 U. S. 238 (1933). It is also evident that the antitrust claims are sufficiently substantial so that, even if they were not to succeed, the District Court would retain jurisdiction of the pendent common law claim. *Taussig* v. *Wellington Fund, Inc.*, 313 F.2d 472, 476 (3rd Cir.), *cert. denied*, 374 U. S. 806 (1963); *Hazel Bishop, Inc.* v. *Perfemme, Inc.*, 314 F.2d 399, 403-04 (2d Cir. 1963); *Rumbaugh* v. *Winifrede Railroad Company*, 331 F.2d 530, 539-40, 541 (4th Cir.), *cert. denied*, 379 U. S. 929 (1964).*

Conclusion

It is submitted therefore that the complaint herein states three claims upon which relief can be granted, each of which was within the jurisdiction of the District Court; that the Federal Aviation Act did not deprive the Court of its jurisdiction; that the conduct alleged in the complaint had not been exempted from the antitrust laws by any orders of the Civil Aeronautics Board nor did any such orders deprive the Court of jurisdiction to adjudicate plaintiff's claims; and that, in any event, the plaintiff's claims were substantial and plainly adequate to invoke the District Court's jurisdiction to decide them, and for that purpose to require discovery, and when discovery was refused, after appropriate notice, to enter the resultant order for a default judgment.

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* Even petitioners' cases (Petitioners' Brief, p. 100, n. 8) suggest no more than that the trial court has *discretion* to dismiss a pendent common law claim if the federal claim is dismissed "at the outset" of the case. *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497, 501 (1st Cir. 1950). Whether to exercise such discretion is a matter for the trial court. Furthermore, the extensive—albeit one-sided—discovery proceedings had herein establish that this case is no longer at its "outset" in this sense.

The judgment of the Court of Appeals should be in all respects affirmed.

Respectfully submitted,

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New York, New York 10005;
Attorney for Respondent,
Trans World Airlines, Inc.

Of Counsel:

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February 18, 1965.

HISTORY OF CAB ORDERS

Order No.	CAB Docket	Parties Other Than Toolco & Controlled Subsidiaries	Subject Matter	Date of Pre-hearing Conference	Date of Hearing	Pleadings Filed By Other Than Toolco and Controlled Subsidiaries	Date of Filing of Application	Date of Oral Argument	Date of Decision	
3210	1182	(1) Dept. of Justice (2) CAB Public Counsel	(1) Inquiry into acquisition of control of TWA by Toolco through ownership of 45% of its stock under Sec. 408. (2) Toolco 1942 assignment to TWA of its right to purchase 40 L-049 Constellations and the 1944 creation of an option in Toolco's favor to reacquire 25 of these aircraft for "experimental use" or resale.	1/ 4/44	3/17/44	(1) Dept. of Justice Petition for Leave to Intervene. (2) Public Counsel's Brief and Exceptions.	11/19/43	3/17/44	10/17/44	(1) Acqui tation two c $10,0 nual r (2) Exist: in co: tions.
4437	1182	None	Provision to Toolco of transportation and overhaul services by TWA.	None	None	None	11/14/45	None	1/26/46	CAB Ord restrict the
E-922	1182	None	Sale by Toolco of "Hughes Airline Radar Units" to TWA.	None	None	None	10/ 3/47	None	10/29/47	CAB Ord restrict the
E-1735 E-4701	2796	CAB Public Counsel	Inquiry into whether increase in Toolco ownership of TWA to up to 80% of its stock is an acquisition of control under Sec. 408.	4/17/47 7/14/47 2/ 4/49	9/10/47 9/11/47 10/ 3/49 10/ 4/49 10/ 5/49 10/ 6/49 10/ 7/49	(1) 2 Public Counsel Statements and a Tentative Statement of Issues. (2) Public Counsel's Answer to Toolco Motion for separate determination of the "control" issue. (3) Public Counsel's Answer to Toolco Motion re: confidential information. (4) 4 Public Counsel Briefs, one marked "Agency Confidential", a Reply Brief and Statement of Exceptions. (5) A number of Exhibits were marked during the hearings.	[Initiated by Board Order of Investigation, 2/7/47]	5/ 3/48	6/30/48 10/ 6/50	(1) Addit to re 408. (2) Acqui but contin under
E-2404	1182	None	Toolco sale of 2 L-049 Constellations to TWA.	None	None	None	10/22/48	None	1/27/49	CAB Ord restrict th nothing in be constru equipment TWA in postal serv that the c priate for purposes."
E-4160	1182	None	Toolco sale of 6 L-049 Constellations to TWA.	None	None	None	2/28/50	None	5/12/50	CAB Ord restrict thi nothing in be constru equipment TWA in postal serv that the co priate for purposes."

HISTORY OF CAB ORDERS

Subject Matter	Date of Pre-hearing Conference	Date of Hearing	Pleadings Filed By Other Than Toolco and Controlled Subsidiaries	Date of Filing of Application	Date of Oral Argument	Date of Decision	Disposition
1) Inquiry into acquisition of control of TWA by Toolco through ownership of 45% of its stock under Sec. 408. 2) Toolco 1942 assignment to TWA of its right to purchase 40 L-049 Constellations and the 1944 creation of an option in Toolco's favor to reacquire 25 of these aircraft for "experimental use" or resale.	1/ 4/44	3/17/44	(1) Dept. of Justice Petition for Leave to Intervene. (2) Public Counsel's Brief and Exceptions.	11/19/43	3/17/44	10/17/44	(1) Acquisition approved subject to limitation of transactions between the two companies to $200 per item and $10,000 per year; TWA to file annual reports of total cash transactions. (2) Existing Toolco-TWA agreements in connection with aircraft acquisitions, not affected.
rovision to Toolco of transportation and overhaul ervices by TWA.	None	None	None	11/14/45	None	1/26/46	CAB Order 3210 modified so as not to restrict these transactions.
ale by Toolco of "Hughes Airline Radar Units" TWA.	None	None	None	10/ 3/47	None	10/29/47	CAB Order 3210 modified so as not to restrict these transactions.
nquiry into whether increase in Toolco ownership TWA to up to 80% of its stock is an acquisition control under Sec. 408.	4/17/47 7/14/47 2/ 4/49	9/10/47 9/11/47 10/ 3/49 10/ 4/49 10/ 5/49 10/ 6/49 10/ 7/49	(1) 2 Public Counsel Statements and a Tentative Statement of Issues. (2) Public Counsel's Answer to Toolco Motion for separate determination of the "control" issue. (3) Public Counsel's Answer to Toolco Motion re: confidential information. (4) 4 Public Counsel Briefs, one marked "Agency Confidential", a Reply Brief and Statement of Exceptions. (5) A number of Exhibits were marked during the hearings.	[Initiated by Board Order of Investigation, 2/7/47]	5/ 3/48	6/30/48 10/ 6/50	(1) Additional Toolco control determined to require CAB approval under Sec. 408. (2) Acquisition of such control approved but Toolco-TWA relationship to continue to be subject to limitations under CAB Order 3210.
olco sale of 2 L-049 Constellations to TWA.	None	None	None	10/22/48	None	1/27/49	CAB Order 3210 amended so as not to restrict this transaction, "provided . . . nothing in the Board's action herein shall be construed as a determination that the equipment here involved is required by TWA in the interest of commerce, the postal service, or the national defense or that the cost thereof to TWA is appropriate for investment and/or rate-making purposes."
olco sale of 6 L-049 Constellations to TWA.	None	None	None	2/28/50	None	5/12/50	CAB Order 3210 amended so as not to restrict this transaction, "provided . . . nothing in the Board's action herein shall be construed as a determination that the equipment here involved is required by TWA in the interest of commerce, the postal service, or the national defense or that the cost thereof to TWA is appropriate for investment and/or rate-making purposes."

HISTORY OF CAB ORDERS—(Continued)

Order No.	CAB Docket	Parties Other Than Toolco & Controlled Subsidiaries	Subject Matter	Date of Pre-hearing Conference	Date of Hearing	Pleadings Filed By Other Than Toolco and Controlled Subsidiaries	Date of Filing of Application	Date of Oral Argument	Date Decis
E-5324	1182	None	(1) Toolco purchase of 1 Martin 404 and 1 L-749A Constellation from TWA and financing of the final installment due by TWA on 4 L-749A Constellations. (2) Toolco undertaking to purchase unissued TWA stock not otherwise sold, in an amount sufficient to provide net proceeds of "at least" $5,000,000 to TWA, or, in the alternative, to lend said amount to TWA.	None	None	None	3/29/51	None	4/25
E-8214	1182 6607	Delta Airlines	TWA's purchase of 3 Constellations from Delta Airlines, through Toolco.	None	None	Delta Motion	3/25/54	None	4/ 1
E-10300	1182	None	TWA purchase of 8 L-1049G and 25 L-1649A Constellations from Toolco.	None	None	None	5/ 2/56	None	5/17
E-10871	1182	None	TWA borrowing of up to $10,000,000 from Toolco to be used as reserve funds.	None	None	None	9/13/56	None	12/18
E-11432	1182	None	(1) "[T]he issuance by TWA to stockholders and pro rata acquisition by Toolco of new common stock which would net TWA at least $34,000,000 . . ." Toolco to purchase all the stock not otherwise sold. (2) TWA borrowing from Toolco of up to $15,000,000 under a revolving credit agreement.	None	None	None	4/ 2/57, amended 5/28/57	None	6/11
E-12604	8061 et al.	None.	Inquiry into whether Toolco's proposed manufacture of up to 25 jet aircraft for possible sale to TWA or other carriers requires CAB approval under Sec. 408.	7/10/56	None	None	5/10/56	None	6/ -
E-13334	1182	None	(1) TWA sublease of 5 L-1049H Constellations and purchase of $1,155,143 of spare parts from Toolco. (2) TWA purchase from Lockheed of 4 L-1049H Constellations previously ordered by Toolco. Provision for sale of these aircraft to Toolco in the event that sublease of 5 L-1049 H aircraft not consummated by 6/1/58. (3) Toolco guarantee of a TWA borrowing of $12,000,000 and of certain payments due Lockheed.	None	None	None	4/18/58	None	12/3(

HISTORY OF CAB ORDERS—(Continued)

Subject Matter	Date of Pre-hearing Conference	Date of Hearing	Pleadings Filed By Other Than Toolco and Controlled Subsidiaries	Date of Filing of Application	Date of Oral Argument	Date of Decision	Disposition
ıase of 1 Martin 404 and 1 L-749A from TWA and financing of the ıent due by TWA on 4 L-749A s.	None	None	None	3/29/51	None	4/25/51	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes.
taking to purchase unissued TWA erwise sold, in an amount sufficient t proceeds of "at least" $5,000,000 , in the alternative, to lend said WA.							
of 3 Constellations from Delta Toolco.	None	None	Delta Motion	3/25/54	None	4/ 1/54	(1) CAB Order 3210 amended so as not to restrict this transaction. (2) No "substantial" purchase of Delta's property under Sec. 408 found. (3) No determination of reasonableness for rate-making purposes.
of 8 L-1049G and 25 L-1649A n Toolco.	None	None	None	5/ 2/56	None	5/17/56	(1) CAB Order 3210 amended so as not to restrict this transaction. (2) No determination of reasonableness for rate-making purposes.
of up to $10,000,000 from Toolco rve funds.	None	None	None	9/13/56	None	12/18/56	(1) CAB Order 3210 amended so as not to restrict this transaction. (2) No determination of reasonableness for rate-making purposes. (3) Order revocable at any time without a hearing.
ıce by TWA to stockholders and uisition by Toolco of new com- hich would net TWA at least . . ", Toolco to purchase all the erwise sold. wing from Toolco of up to ıder a revolving credit agreement.	None	None	None	4/ 2/57, amended 5/28/57	None	6/11/57	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Any additional control resulting from these transactions, approved. (4) Order revocable at any time without a hearing.
er Toolco's proposed manufacture craft for possible sale to TWA or res CAB approval under Sec. 408.	7/10/56	None	None	5/10/56	None	6/ 4/58	Dismissal without prejudice on TWA's withdrawal of Motion for Approval.
of 5 L-1049H Constellations and $1,155,143 of spare parts from se from Lockheed of 4 L-1049H previously ordered by Toolco. sale of these aircraft to Toolco in sublease of 5 L-1049 H aircraft ıted by 6/1/58. ntee of a TWA borrowing of d of certain payments due Lock-	None	None	None	4/18/58	None	12/30/58	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Any additional control resulting from transactions, approved. (4) Order revocable at any time without a hearing.

HISTORY OF CAB ORDERS—(Continued)

Order No.	CAB Docket	Parties Other Than Toolco & Controlled Subsidiaries	Subject Matter	Date of Pre-hearing Conference	Date of Hearing	Pleadings Filed By Other Than Toolco and Controlled Subsidiaries	Date of Filing of Application	Date of Oral Argument	Date of Decision
E-13542	1182	None	TWA's lease of one Boeing 707-131 jet and purchase of spare parts not to exceed $100,000, from Toolco.	None	None	None	1/30/59	None	2/26/5
E-13873	1182	None	(1) TWA's lease of up to 11 Boeing 707-131 jets from Toolco. (2) TWA's purchase of spare parts from Toolco not to exceed $3,500,000. (3) TWA's lease of up to 30 jet engines from Toolco.	None	None	None	3/16/59	None	5/15/5
E-14169	1182	None	TWA's lease of 4 additional Boeing jets from Toolco and the extension of the duration of existing aircraft leases, together with the purchase of spare parts.	None	None	None	6/29/59	None	7/ 1/5
E-14504	1182	None	Extension of duration of TWA's existing jet leases with Toolco.	None	None	None	9/23/59	None	9/30/5
E-14877	1182	None	TWA's lease of up to 8 Boeing 707-331 jets and up to 8 Convair 880's from Toolco, together with the purchase of spare parts.	None	None	None	11/ 6/59	None	1/29/(
E-15430	1182	None	(1) TWA's purchase of 25 Boeing jets and 20 Convair 880s and related equipment from Toolco. (2) The sale of $160,000,000 of bonds to institutional investors (Toolco later became a party to this agreement.)	None	None	None	4/ 1/60 4/14/60 5/ 6/60	None	6/23/(

HISTORY OF CAB ORDERS—(Continued)

Subject Matter	Date of Pre-hearing Conference	Date of Hearing	Pleadings Filed By Other Than Toolco and Controlled Subsidiaries	Date of Filing of Application	Date of Oral Argument	Date of Decision	Disposition
TWA's lease of one Boeing 707-131 jet and purchase of spare parts not to exceed $100,000, from Toolco.	None	None	None	1/30/59	None	2/26/59	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Order revocable at any time without a hearing.
(1) TWA's lease of up to 11 Boeing 707-131 jets from Toolco. (2) TWA's purchase of spare parts from Toolco not to exceed $3,500,000. (3) TWA's lease of up to 30 jet engines from Toolco.	None	None	None	3/16/59	None	5/15/59	(1) CAB Order 3210 amended so as not to restrict these transactions except that consideration of application as to jet engine leases deferred pending the filing of the terms of the leases. (2) No determination of reasonableness for rate-making purposes. (3) Each aircraft lease to be filed within 10 days of its execution. (4) Order revocable at any time without a hearing.
TWA's lease of 4 additional Boeing jets from Toolco and the extension of the duration of existing aircraft leases, together with the purchase of spare parts.	None	None	None	6/29/59	None	7/ 1/59	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Each aircraft lease to be filed within 10 days of its execution. (4) Order revocable at any time without a hearing.
Extension of duration of TWA's existing jet leases with Toolco.	None	None	None	9/23/59	None	9/30/59	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Order revocable at any time without a hearing.
TWA's lease of up to 8 Boeing 707-331 jets and up to 8 Convair 880's from Toolco, together with the purchase of spare parts.	None	None	None	11/ 6/59	None	1/29/60	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Each aircraft lease to be filed within 10 days of its execution. (4) Order revocable at any time without a hearing.
(1) TWA's purchase of 25 Boeing jets and 20 Convair 880s and related equipment from Toolco. (2) The sale of $160,000,000 of bonds to institutional investors (Toolco later became a party to this agreement.)	None	None	None	4/ 1/60 4/14/60 5/ 6/60	None	6/23/60	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Specific exemption from Sec. 408 for TWA under Sec. 416. (4) Order revocable at any time without a hearing.

HISTORY OF CAB ORDERS—(Continued)

Order No.	CAB Docket	Parties Other Than Toolco & Controlled Subsidiaries	Subject Matter	Date of Pre-hearing Conference	Date of Hearing	Pleadings Filed By Other Than Toolco and Controlled Subsidiaries	Date of Filing of Application	Date of Oral Argument	Date of Decision
			(3) Sale of $100,000,000 of "junior securities" through a rights offering to stockholders in an as yet undetermined form, Toolco to purchase this amount in the event that other stockholders do not subscribe to their share. (4) Toolco short-term loan of $50,000,000 to TWA, and guarantee of an interim TWA borrowing of $50,000,000 from banks, to be repaid from the proceeds of the permanent financing. (5) TWA acquisition of Toolco's interest in a Link Aviation Flight Simulator.						
E-15561	1182	None	Transactions covered by CAB Order E-15430, which had not been consummated, with the following principal modifications: (1) TWA acquisition of 2 more Boeing aircraft and 5 more jet engines from Toolco. (2) Increase in bonds to $168,000,000. (3) "Junior Securities" to be in the form of debentures bearing stock purchase warrants. (4) Contingent institution of a voting trust over Toolco's stock interest in TWA in the event of default.	None	None	None	7/ 1/60	None	7/21/6
E-16195	1182 2796	None	Transactions covered by CAB Order E-15561, which had not been consummated, with the following principal modifications: (1) Decrease in bonds to $165,000,000. (2) TWA cash payment to Toolco of $54,892,499.35 stated to be due on outstanding obligations, plus $1,068,356.52 in accrued interest. (3) Junior Securities to take form of "Interim Subordinated Notes" to be sold to Toolco and refinanced before 5/31/61 through the issue of not less than $100,000,000 or more than $112,000,000 of subordinated debentures bearing stock purchase warrants. (4) 10 year voting trust agreement over Toolco's stock in TWA. (5) Interlocking relationships of Voting Trustees.	None	None	None	12/23/60, supplemented 12/27/60	None	12/29/6

HISTORY OF CAB ORDERS—(Continued)

Subject Matter	Date of Pre-hearing Conference	Date of Hearing	Pleadings Filed By Other Than Toolco and Controlled Subsidiaries	Date of Filing of Application	Date of Oral Argument	Date of Decision	Disposition
(3) Sale of $100,000,000 of "junior securities" through a rights offering to stockholders in an as yet undetermined form, Toolco to purchase this amount in the event that other stockholders do not subscribe to their share. (4) Toolco short-term loan of $50,000,000 to TWA, and guarantee of an interim TWA borrowing of $50,000,000 from banks, to be repaid from the proceeds of the permanent financing. (5) TWA acquisition of Toolco's interest in a Link Aviation Flight Simulator.							
Transactions covered by CAB Order E-15430, which had not been consummated, with the following principal modifications: (1) TWA acquisition of 2 more Boeing aircraft and 5 more jet engines from Toolco. (2) Increase in bonds to $168,000,000. (3) "Junior Securities" to be in the form of debentures bearing stock purchase warrants. (4) Contingent institution of a voting trust over Toolco's stock interest in TWA in the event of default.	None	None	None	7/ 1/60	None	7/21/60	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Specific exemption from Sec 408 for TWA under Sec. 416. (4) Order revocable at any time without a hearing.
Transactions covered by CAB Order E-15561, which had not been consummated, with the following principal modifications: (1) Decrease in bonds to $165,000,000. (2) TWA cash payment to Toolco of $54,892,499.35 stated to be due on outstanding obligations, plus $1,068,356.52 in accrued interest. (3) Junior Securities to take form of "Interim Subordinated Notes" to be sold to Toolco and refinanced before 5/31/61 through the issue of not less than $100,000,000 or more than $112,000,000 of subordinated debentures bearing stock purchase warrants. (4) 10 year voting trust agreement over Toolco's stock in TWA. (5) Interlocking relationships of Voting Trustees.	None	None	None	12/23/60. supplemented 12/27/60	None	12/29/60	(1) CAB Order 3210 amended so as not to restrict these transactions. (2) No determination of reasonableness for rate-making purposes. (3) Specific exemption from Sec. 408 for TWA under Sec. 416. (4) Order revocable at any time without a hearing. (5) Interlocking relationships of Voting Trustees approved under Sec. 409

ANNEX B

Letter from Counsel for Bureau of Economic Regulation to Counsel for TWA

[LETTERHEAD OF]

CIVIL AERONAUTICS BOARD
Washington 25, D. C.

April 16, 1962

Dudley Tenney, Esq.
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York, N. Y.

Dear Mr. Tenney:

Re: Toolco—Northeast Control Case
Docket 11620, et al.

Enclosed are copies of letters sent to Messrs. Cocke, Fellows, Leslie and Rummell today, releasing them from the subpoenas previously served in the above case. As you have undoubtedly heard from Abe Ordover, the Hearing Examiner ruled out any investigation into the economy or efficiency of Toolco's management and control of TWA. With this issue out, and with the antitrust litigation in its present posture, we did not deem it necessary to press forward on other issues on which their testimony might have been needed. Although the Examiner's ruling is subject to appeal, we do not anticipate that the Board will reopen the case to take further testimony at this time.

Please thank Messrs. Sonnett and Williams for their co-operation, and also convey our appreciation to Mr. Rowe. I shall be in touch with you further in due course.

Sincerely yours,

/s/ PAUL Y. SELIGSON
Paul Y. Seligson,
Bureau Counsel

ANNEX C

Excerpts from Brief of Bureau of Economic Regulation dated May 23, 1962, filed with the Civil Aeronautics Board in Docket No. 11620.

* * * * *

"The Initial Decision attempts to engage in a balancing process and finds that the public interest in keeping Northeast alive would outweigh that in preventing an uneconomic or inefficient operator from gaining control of an airline (I.D. 6). In so finding, the Initial Decision commits two errors of logic: (1) it attempts to strike a balance without placing any weights on one side of the scale, and (2) it ignores the plain language of the statute. For, since the Examiner had no evidence of Hughes/Toolco's mismanagement before him, he had no way of accurately judging its weight.[9] Logically, then, the Examiner must have concluded that no showing of lack of economy or efficiency, no matter how great the mismanagement, could outbalance the public interest in Northeast's survival. Such an approach ignores a major element of the declared statutory policy: 'the promotion of adequate, economical and efficient service by air carriers.'[10]

"As noted above, the Examiner did rule admissible evidence of illegal acts or improper self-dealing by Toolco, stating that the public interest in excluding dishonest or illegal actions by persons controlling an airline could outweigh that in keeping Northeast alive (I.D. 6). Obviously, outright dishonesty or illegality poses a different moral issue than inefficiency, mismanagement, or negligence. However, the Examiner does not explain, nor does it necessarily follow that the challenge to the public

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"9. The Bureau was not able to make a complete offer of proof because much of the testimony would have come from witnesses beyond its control, several of whom were presumably hostile; because Toolco had failed to produce many relevant documents; and because Howard Hughes was not made available as a witness.

"10. Federal Aviation Act, Section 102(c)."

interest would be greater in this instance from purposeful improper conduct than from managerial incompetence or inefficiency. Nonetheless, we might not have even taken issue with the scope of the hearing had the Examiner merely imposed a greater burden on those seeking disapproval of the acquisition because of mismanagement, as opposed to illegality. But the exclusionary ruling went much further: it deprived the parties of any opportunity to make a record on which the Board could fairly judge the issues.

"Furthermore, the Examiner erred in treating mismanagement and dishonesty as if they could be separated into watertight compartments. In reality, the ruling made impractical inquiry into even the limited questions which the Examiner said he would permit to be raised. Thus, in many instances, the facts going to show both self-dealing and mismanagement are inextricably intertwined. We would have needed freedom fully to develop lines of inquiry before we ourselves were in a position to judge fairly whether self-dealing or mismanagement had been shown. (Frankly we should note, however, that documents in our possession at the time indicated inefficiency, neglect, or incompetence to be a far more significant problem than outright illegality or improper self-dealing).

"For example, we might have elicited testimony tending to show that Mr. Hughes attempted to dominate completely the TWA board of directors. Standing alone, such testimony might be one link in a chain of either self-dealing or mismanagement. We might then have moved further and attempted to elicit testimony that Mr. Hughes preferred one type of financing arrangement for TWA to another, and that he delayed, beyond any reasonable period from the standpoint of TWA's needs, accepting the type of financing he did not wish. Again, this could be another link in a chain of either self-dealing or misman-

agement. To prove self-dealing, and thereby render the testimony admissible under the Examiner's ruling, we would then have had first to submit allegations as to Mr. Hughes' motivation. Presumably, if we were unable at the outset to suggest an illegal motivation, then, under the restrictive ruling, the whole line of testimony would have been excluded. Even if we had been allowed to start a line of inquiry, at what point in our examination would the Examiner have sustained an objection? Because of the limited production of information which Toolco had made, it would have been extremely difficult, if at all possible, to establish Hughes' motivations—particularly since Mr. Hughes chose not to submit himself to examination, and it was relatively certain that he could not have been forced to appear by legal process within the time limits involved. In short, the Bureau would have found it impossible, as a practical matter, to elicit the testimony needed to illuminate the public interest involved, under these circumstances and within the strict limits the Examiner had set.

"The Initial Decision states that the Bureau was informed that it could go thoroughly into such questions and that its examination would not be restricted because development of facts concerning honesty might also be relevant to the question of efficiency. However, at the hearing the Examiner told Bureau Counsel, 'If you want to cross-examine on that basis and you get in forbidden territory, I will stop you' (Tr. 934). Furthermore, despite the mid-hearing change in the issues to be tried, the parties were not given additional time to revise their cases in response to the changed circumstances.

"The practical impossibility of adapting to the dichotomy drawn in mid-hearing by the Examiner is well illustrated in the Initial Decision. The Examiner found, *on the basis of the record before him*, that Toolco's action in making jet aircraft available to Northeast 'was of sub-

stantial benefit' to the carrier (I.D. 23). This finding is bottomed on testimony that, absent Toolco's action, Northeast would not have obtained its Convair jets in time for the 1960-61 winter season, because of delays in General Dynamics' production schedule. The *reasons* for these delays are not established on the record, although it is common knowledge that, at least in part, the delays relate directly to actions of Mr. Hughes and Toolco." (pp. 7-10) (Emphasis in original.)

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"* * * although the Examiner had set an extremely tight procedural schedule for a case of this magnitude, Toolco suddenly switched its tactics: while it made a large mass of documents available to the Bureau, Toolco failed to produce much of significance. It withheld virtually all evidence directly showing the role played by Howard Hughes, although this was obviously among the most critical material. At the hearing, Toolco continued to delay production of these data until the Examiner threatened to defer the hearing until they or Mr. Hughes were produced. Finally, Toolco produced certain documents, many on the last day of the hearing, too late to be of major practical value to the development of a record.

"At every stage, Toolco either used Northeast's dire financial condition as a goad toward speed, or Northeast itself implored the Examiner to expedite the case. The net result is a vapid record, full of sound and fury, with little substance.

"This is particularly significant because of Toolco's ultimate objectives in this case. During the course of the hearing, as Toolco was required to state its position more and more specifically, and as it sought to avoid direct response to repeated directions by the Examiner to produce certain evidence, it became apparent that Toolco wants approval of its control of Northeast not because of anything intrinsic to the airline, but as an aid toward

regaining control of TWA. Aside from testimony taken in executive session which may not be quoted here,[12] Toolco in a document which was publicly filed *after* the Examiner's exclusionary rulings, stated that it seeks, *in this proceeding*,

> 'a clear-cut determination by the Board that activities by Toolco in connection with its control of TWA . . . were not inconsistent with the [Federal Aviation Act] and the Board orders promulgated pursuant thereto.'[13]

This veiled language, when considered together with other statements of record, clearly indicates that Toolco hopes for Board approval in very broad language so that Toolco will either have a powerful weapon for a settlement of the TWA antitrust suit under which it would regain control of TWA, or so that Toolco may urge the defense of primary jurisdiction to the TWA complaint. A further hypothesis may well be that such an order would be a powerful weapon with which to avoid careful scrutiny by the Board should Toolco attempt to regain control of TWA.[14]

"These are not idle fears, as the Examiner recognized. Although he noted that 'it should go without saying that the decision herein is limited to the issues in this proceeding and is based on the evidence of record only,' the Examiner found it necessary to add that *'it is not concluded herein that Toolco's relationships with TWA and*,

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"12. But see, *e.g.*, Exec. Sess., Tr. 234, *et seq.*, 241.

"13. Answer of Toolco to Northeast Motion for Certification to Board for Decision, filed April 13, 1962, page 6.

"14. In Order E-16195, dated December 29, 1960, the Board in approving TWA's 1960 financing program said at page 6 that 'it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.'"